SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-721

MINDY MEYERS, an infant, by her parent and natural guardian, MARVIN MEYERS, and MARVIN MEYERS, individually, and LYNDA BIENENFELD, an infant, by her parent and natural guardian, STANLEY BIENENFELD, and STANLEY BIENENFELD, individually,

Petitioners,

—v.—

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

HUBERT DAYE; TEDESCO BUS COMPANY, INC.; FRANK TEDESCO; and ACADEMY CHARTER SERVICE, INC., each in his or its own right and also on behalf of all passengers of Bus 2065 of the Tedesco Bus Company, Inc., injured on July 15, 1970, at New Smithville, Lehigh County, Pennsylvania, their parents, guardians, next of kin, heirs and legal representatives,

Petitioners,

—v.—

THE COMMONWEALTH OF PENNSYLVANIA, THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, VICTOR W. ANCKAITIS, LESTER E. JORDAN, CHARLES C. SINCAVAGE, WILLIAM I. DAVIS, ROBERT BROWN and EDWIN REIKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on August 3, 1973 (Appendix, p. 1a hereto, *infra*).

Opinions Below

The District Court, Eastern District of Pennsylvania (Troutman, *D.J.*), entered an opinion and order on June 30, 1972, reported at 344 F. Supp. 1337 (E.D. Pa., 1972), granting the motion of the defendant, The Commonwealth of Pennsylvania to dismiss the complaints (Appendix, p. 2a, hereto, *infra*). The opinion of the Court of Appeals for the Third Circuit was entered on August 3, 1973 and affirmed the order of the District Court dismissing the complaints. This opinion, as yet unreported, appears in the Appendix at p. 16a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 3, 1973 (App., p. 1a hereto, *infra*).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Did the lower courts err in dismissing plaintiffs' complaints on the grounds that Congress in enacting the Highway Safety Act of 1966 (23 U.S.C., § 401, *et seq.*) did not have as its paramount purpose that those states participating in the federal grant-in-aid highway programs secure the safety of those using the federal-aid highways?

2. Did the Commonwealth by its meaningful, ongoing participation in the federal-aid highways programs waive its immunity from suit under the Eleventh Amendment?

3. Did the court incorrectly rule that the Federal-Aid Highways Act and Highway Safety Act did not create an implied cause of action in favor of plaintiffs to recover for their injuries?

Constitutional and Statutory Provisions Involved

1. The Eleventh Amendment to the Constitution of the United States is involved; it provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . ."

2. Article I, Section 8, Clause 3 of the Constitution of the United States is involved; it provides as follows:

> "The Congress shall have power to regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes."

3. The following are the pertinent parts of the relevant statutes involved herein:

a) Federal-Aid Highways Act, 23 U.S.C., § 101, *et seq.* (App., p. 27a hereto, *infra*).

b) Highway Safety Act, 23 U.S.C., § 401, *et seq.* (App., p. 32a hereto, *infra*).

Statement of the Case

Introduction:

The facts are undisputed. On July 15, 1970, plaintiffs *Meyers* were on *Tedesco's* chartered interstate tour bus then carrying 53 children aged 10 to 17, and their counselors, on a sightseeing educational trip from Lawrence, New York, to the Pennsylvania Dutch country. While the bus was travelling westbound on U.S. Route 22 (Interstate 78), and approximately 12 miles west of Allentown, Pennsylvania, and traversing a slight curve to the right during a light rain which had been preceded by a heavy shower, the bus started to slide on the wet highway, then rotated 180°

clockwise, overturned through a guardrail, and plunged down an embankment. Seven children passengers were killed in this accident, eighteen occupants of the bus were ejected, and 47 other occupants sustained various personal injuries.[1] Plaintiff, *Mindy Meyers,* aged 11, sustained a fractured skull, a severe cerebral concussion, multiple fractures of the left clavicle, and a ruptured spleen, among other injuries; plaintiff, *Lynda Bienenfeld,* aged 18, sustained a fractured pelvis, a compression fracture of the spine, and a cerebral concussion, among other injuries. Plaintiff, bus driver, *Hubert Daye,* also sustained severe injuries.

The Report of the National Transportation Safety Board:

This tragedy was designated a "major accident" as defined in the regulations of the National Transportation Safety Board ("the Safety Board"). An exhaustive investigation followed by the Safety Board which was reduced to a printed 61 page report".[2] The findings of the Safety Board as to the probable causes of the accident are of more than pedestrian interest. The Report said:

> The National Transportation Safety Board determines that the probable cause of the accident was either dynamic or viscious hydroplaning of the

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[1] The *Daye* case which has been consolidated with *Meyers* for the purpose of a joint hearing and argument was originally brought on behalf of (i) the bus driver and corporate owner of the bus, and (ii) as a class action on behalf of all passengers on the bus, and persons claiming under them. *Daye* has abandoned its class action claims. *Meyers* has no interest in the class action portion of the *Daye* complaint. This is a joint petition for both *Meyers* and *Daye.*

[2] A copy of the Report was incorporated into *Meyers'* brief below, ". . . whose conclusions . . ." were accepted by the district court for the purpose of the motion to dismiss. See, 344 F. Supp. at 1340 fn. 5.

front wheels of the bus which initiated a skid *from which the driver could not recover.* Contributing factors included low basic skid resistance of the pavement in wet weather, and the probable presence of water draining across the pavement in an abnormal manner. *The fatalities and injuries were caused by an ineffective highway guardrail which failed to prevent the bus from rolling down an embankment* . . . (emphasis added) [p. 38].

In summarizing the accident experience of U.S. 22 from the Lehigh County line to a point 1,200 feet east, for both directions of travel, for the period 1966 to July 19, 1970, the Safety Board determined that this tragedy was anything but an isolated event. The Safety Board found [3] that during the test period there were 59 *reported* accidents [4] resulting in 11 deaths, and injuries to 98 other persons. No accurate records exist for the other "many property-damage accidents" [5] at this site.

The Report memorializes that the tragedy was caused by the highway and those responsible for its maintenance.

The Complaints and the Commonwealth's Motions:

Plaintiffs *Meyers* alleged that on the day in question, they embarked from the State of New York, for the purpose, *inter alia*, of entering into The Commonwealth of Pennsylvania, and engaging in commerce therein. Juris-

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[3] The Report at 11-12.

[4] Appendix E to the Report (p. 53), summarized the findings as follows:

ACCIDENT SEVERITY

Injury Accidents	27	Persons Killed	11
Fatal Accidents	5	Persons Injured	98
P.D.O. Accidents	27	Total Property Damage	$200,000
Total Accidents	59	(Reported Accidents Only)	

[5] The Report at 11.

dictional bases alleged by *Meyers* and *Daye* presented federal questions under the Constitution and laws of the United States. *Aside* from pleading the alleged failure of The Commonwealth to use reasonable care in the design, construction and maintenance * of U.S. 22, all in violation of the Federal-Aid Highways Act, 23 U.S.C. § 101, *et seq.*, and the Highway Safety Act, 23 U.S.C. § 401, *et seq.*, plaintiffs *Meyers* alleged that their rights under the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3), had been violated in that The Commonwealth had "invited" *Meyers* to enter into the state for purposes of commerce while knowingly misrepresenting and falsely warranting that the routes to be travelled were safe, and that they complied with the safety standards of the laws of the United States, when, in fact, The Commonwealth knew such not to be so.

The motions to dismiss did not raise or challenge any factual allegation of plaintiffs, but rather was addressed to the adequacy of the complaints. By moving "in the alternative", for summary judgment, The Commonwealth admitted the verity of its responsibilities in causing the accident.

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* The full text of the provisions and regulations in issue are set forth as footnotes by the district court in its opinion. See, 344 F. Supp. at 1339, 1340, fn. 1-4, and 344 F. Supp. at 1348, fn. 14.

Reasons for Granting the Writ

I.

The Highway Safety Act of 1966 has as its purpose: securing the safety of those using the Federal Grant-in-Aid Highways.

Both the District Court and the Court of Appeals relying on the holding in *Mahler* v. *United States,* 306 F.2d 713 (3d Cir. 1958), *cert. denied,* 371 U.S. 923, 9 L. Ed. 2d 231, 83 S. Ct. 390 (1962), decided that the complaints must be dismissed [344 F. Supp. at 1347]. In *Mahler*, the Third Circuit said [306 F.2d at 721]:

> In light of the legislative history traced above, it is plain that the appellants cannot successfully rely on the federal highway acts *unless they are able to show that legislation following the Act of 1921* has affixed to the inspection and approval sections *the additional purpose* of securing the safety of those using the federal-aid highways (emphasis added).

It follows, *a fortiori,* that upon a showing of such subsequent legislation, and purpose, a cause of action under the federal-aid highways acts is stated. Since *Mahler,* such legislation has been enacted. In 1965, the Baldwin Amendment was added to Title 23 of the United States Code, which clearly established the federal-state responsibility for a program of highway safety, with uniform standards to be approved by the Secretary.[6] The following

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[6] Pub. L. 89-139 § 4(a), 79 Stat. 578 added a new section 135 to Title 23 U.S.C. which provided that: "After December 31, 1967, each State should have a highway safety program, approved by the Secretary, *designed to reduce traffic accidents and deaths,*

[footnote continued on following page]

year Congress passed the Highway Safety Act [7] in order to provide for a coordinated national safety program.[8] Such a program was required to eliminate the death and destruction taking place on the national highways.[9]

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injuries, and property damage resulting therefrom on the Federal-aid system. Such highway safety program should be in accordance with uniform standards approved by the Secretary and should include . . . provisions for an effective accident reports systems, *and* measures calculated to improve . . . highway design and maintenance . . . and surveillance of traffic *for detection and correction of high or potentially high accident locations* (emphasis added).

Unlike the case under review here, *Mahler involved a claim* under the federal torts claim act against the United States.

The provisions of the former § 135 have been reworded and made a part of the Highway Safety Act, Title 23 U.S.C., Chapter 4. The word "shall" replaced "should" in the 1966 Highway Safety Act.

[7] Chapter 4, Title 23 U.S.C., added Pub. L. 89-564, Title I, § 101, 80 Stat. 731, amended Pub. L. 90-495, § 13, 82 Stat. 822; Pub. L. 91-605, Title II, §§ 202(c)-(e), 203(a), 84 Stat. 1740, 1741.

In addition to the carry-over provisions of the former § 135, the new § 402(a), (fn. 6, *supra*) added the requiremnt that the states investigate "surface treatments" of the roads as part of its maintenance program to detect and correct high accident zones for the purpose of reducing deaths and injuries resulting from such accidents.

[8] Title 23 U.S.C., § 125(b) authorized the payment of additional funds for emergency repairs to these highways. *Cf.*, 23 C.F.R., Subchapter B, Part 204, Uniform Standards for State Highway Safety Programs.

[9] The relevant legislative history is reported in 3 United States Code Congressional & Administrative News, 1965, at 2857, where the House Report 681, said: "The committee is gravely concerned about the Nation's traffic highway accident toll. Last year 47,700 Americans were killed in traffic accidents.

* * *

"But the committee believes that research in this field, although conceded to be incomplete, has already developed enough information and answers to support affirmative, coordinated, State action programs of highway safety. The important consideration

[footnote continued on following page]

In conjunction with the other provisions of Title 23, the Highway Safety Act (23 U.S.C. § 401, *et seq.*), provided positive legislation aimed to deal effectively with the problem of carnage on the federal highways. *Mahler* teaches that the job of highway safety and maintenance runs to the states. 306 F.2d at 717. *Cf.*, 23 U.S.C. §§ 116(a). In 1966 the federal government renewed its efforts to insure that states taking advantage of federal highway funds also maintained the safety of the resulting road for its users.

Judge Troutman's reliance on *South Carolina Highway Dep't.* v. *Barnwell Bros.*, 303 U.S. 177, 82 L. Ed. 734, 58 S. Ct. 510 (1938), quoted in *Mahler* [306 F.2d at 716], for the proposition that The Commonwealth in constructing U.S. 22 was engaging in a sphere 'wholly its own' [344 F. Supp. at 1346], and thus did not partake in a federal activity, overlooks some key language. In *South Carolina*, *supra*, Mr. Justice Stone recognized that, a

> [S]tate can, if it sees fit, build and maintain its own highways, canals and railroads *and that in the absence of Congressional action* their regulation is peculiarly within its own competence, even though interstate commerce is materially affected [303 U.S. at 187] (emphasis supplied).

The difficulty here is that *there is Congressional action*, and so regulation of the highway is *no longer* within the *exclusive* competence of The Commonwealth. The "regulation" of the highway is within the federal government; the ministerial maintenance is the responsibility of the state.

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is the fact that coordinated State action programs have generally been missing, and should be established now. . . . In the meantime, *if one life is saved, the establishment of coordinated action programs will be a success* (emphasis added).

In both the Senate Report 1302 and Conference Report 1920 on the Highway Safety Act, safety standards to be approved by the Secretary were provided for. The Reports stated a need for surveillance, detection and correction of high or potentially high accident locations. See, 2 U.S. Code Congressional & Administrative News, 1966, at 2745. In the Senate Report special attention is given to a Committee amendment to the standards provisions of § 402(a), concerning surface treatment of roadways. The Senate Report said [Id. at 2746]:

> This provision is included on the basis of evidence presented to the Committee in executive session which demonstrated significant success in the State of California in reducing accidents from skidding, or hydroplaning, on wet pavement.

From the legislative history of the amendments to the federal-aid highways acts subsequent to *Mahler*, it is obvious that such legislation was enacted in order to prevent the type of accident that has given rise to these actions.

It is clear, however, that even though U.S. 22 was completed in 1958, The Commonwealth was and is under a continuing duty to *maintain* the highway in accordance with *existing* standards.[10] Such obligation continues so long as The Commonwealth remains a participant under the federal-aid highways program. See, 23 U.S.C. § 116 (a) [344 F. Supp. at 1339 fn. 3]. To accept Judge Troutman's explanation would entirely sterilize the effect of the Highway Safety Act by applying it only to new highways constructed after passage of the Act. Such was not

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[10] 23 U.S.C. § 116(a) provides in part that: "It shall be the duty of the State highway department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts." *See also*, 23 C.F.R. Subchapter B, Part 204, Uniform Standards for State Highway Safety Programs.

the intent since *all* highways, new and old must obviously comply with the *current* standards; new highways must be *constructed* under these regulations and existing highways *maintained* under the same standards. The Act and regulations when read clearly indicate applicability to both.[11] Unilaterally, The Commonwealth has decided which parts of Title 23 it chooses to obey, and which to ignore. If The Commonwealth found that maintaining safe roads was too burdensome, it could have withdrawn from the system. It cannot 'choose and pick' which parts of the law to obey. By continuing to operate in the system after the passage of the Highway Safety Act, The Commonwealth is deemed to have elected to participate burdened by the regulations imposed by the new amendments. *See, Briggs* v. *Sagers,* 424 F.2d 130, at 134 (10th Cir. 1970), *cert. denied,* 400 U.S. 829, 27 L. Ed. 2d 59, 91 S. Ct. 58 (1970). We are not concerned that U.S. 22 was originally built in 1958. We are concerned, however, with the fact that The Commonwealth continued active participation in the federal program with full knowledge of the obligations of the 1966 Highway Safety Act.

Having nursed U.S. 22 from the federal breast, The Commonwealth has been rewarded for its cavalier indifference to the safety of users of the highway, by the decisions below. In the face of the long history of prior accidents at the location in issue, the failure of The Commonwealth to take steps to correct the conditions when viewed by the requirements of the Highway Safety Act is so gross and reckless as to be criminal. Everything which is decent and honorable recoils at The Commonwealth's conduct in not maintaining U.S. 22. This is a case of "hit and run": The Commonwealth has "hit" the federal government for funds under the program, but has "run" away from its obligations under the Highway Safety Act. To permit this is to completely frustrate the legislative purposes of the Highway Safety Act of 1966.

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[11] See, 23 U.S.C. § 403 (App., p. 33a, *infra*).

II.

The Commonwealth of Pennsylvania, by its meaningful, ongoing participation in the federal-aid highways programs, has waived its immunity from suit under the Eleventh Amendment.

The question is one of first impression: Has The Commonwealth, by meaningful participation in the federal-aid highways program, an area regulated by Congress, thereby waived its immunity from suit under the Eleventh Amendment for actions arising out of such participation?

Both the District Court and the Third Circuit have held that a state's waiver of its Eleventh Amendment immunity will be found only where stated in the "most express language" or when presented by "overwhelming implication", and that an "intentional relinquishment or abandonment" of the protection must be shown by plaintiff.

Although, not yet fully developed, the progeny of *Petty* v. *Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. (1959), and *Parden* v. *Terminal R. Co. of Ala.*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), are reshaping judicial thinking on the subject of waivers of immunity.

In *Briggs* v. *Sagers*, 424 F.2d 130 (10th Cir. 1970), *cert. denied*, 400 U.S. 829, 27 L. Ed. 2d 59, 91 S. Ct. 58 (1970), the State of Utah in resisting a suit under the Fair Labor Standards Act, raised the defense of immunity under the Eleventh Amendment in that it had neither knowingly nor intentionally waived immunity to suit. The State of Utah in *Briggs* was operating a state-owned institution for the custody and care of mentally deficient children

and adults (424 F.2d at 131). The activities were entirely in a sphere of state concern, within Utah's own borders, and were begun *before* Congress legislated in the area. After commenting that, ". . . in the realm of interstate commerce, the congressional authority is supreme and conflicting state interests and rights must yield" (424 F.2d at 132), the *Briggs* court considered it to be the present position of the Supreme Court that regarding a state's intent, or lack of same, to waive its immunity, or a state's contention that it was not aware that a waiver would result from certain activity that, [424 F.2d at 134],

> [E]ven the dissent in *Parden* did not view the opinion as pivoting on the fact of an intentional waiver. Rather, the dissenting Justices understood the majority to hold "that with regard to sovereign immunity, *waiver of a constitutional privilege need be neither knowing nor intelligent.*" [377 U.S. at 200] (emphasis added).

The Commonwealth has "knowingly" entered into an area of federal regulation and has "consented" to be bound by all requirements of the program in order to maximize the flow of federal funds. Title 36 of Purdon's Pennsylvania Statutes, § 670-1004, provides, in relevant part,

> The Secretary [of Highways of Pennsylvania] shall enter into all necessary contracts and agreements with the proper agencies of the government of the United States, *and shall do all other things necessary* and proper in order to obtain the benefits afforded under * * * [the federal-aid highways programs] *and its supplements and amendments*, or any other act of Congress providing Federal aid for highway purposes (emphasis supplied).

Section 670-1005, states, in part [36 Purdon's Pennsylvania Statutes] that,

> The department [Pennsylvania Highways] shall have authority to make and carry out contracts and to do every other act necessary to carry out any project *heretofore or hereafter undertaken* which is to be paid for in whole or in part from Federal funds, *and in every way to conform to the requirements and rules and regulations of the proper Federal authorities with respect to such projects* . . . (emphasis added).

Thus, it can hardly be said by The Commonwealth that it did not "know" that it would be bound to comply with federal regulations as the result of its participation in the program. Quite the contrary is true: its Secretary of Highways was *directed* "in every way to conform" to the requirements. By engaging in the federal-aid highways program, The Commonwealth is partaking in activities of a paramount federal interest, and as such subjects itself fully to such regulation. *South Carolina* v. *United States*, 199 U.S. 437, 50 L. Ed. 261, 26 S. Ct. 110 (1905).

Although *Petty* and *Parden* are self-limiting because of their particular facts, the broad principles they stand for are being further expanded as the situations require. The *Briggs* case, *supra*, ruled, on the basis of the holding in *Parden* that a waiver need be neither knowing nor intelligent, but arises *by implication* from the mere *engaging* in a sphere subject to congressional regulation. The Third Circuit has recently considered the situation in *Pennsylvania Environmental Council, Inc.* v. *Bartlett*, 454 F.2d 613 (3d Cir. 1971), where the panel indicated that a state's *engaging* in activities in a federally-regulated realm would give rise to an *implication* of a waiver of immunity. The Court said [454 F.2d at 625]:

> But a state may, *by engaging in activities* of a paramount federal interest, waive its immunity under the eleventh amendment [citing *Petty* and *Parden*] (emphasis supplied).

The District Court rejected *Chesapeake Bay Bridge and Tunnel District* v. *Lauritzen*, 404 F.2d 1001 (4th Cir. 1968), relied upon by plaintiffs [344 F. Supp. at 1337], on the basis that *Lauritzen* was at variance with the holding *Red Star Towing & Transp. Co.* v. *Dep't. of Transp. of New Jersey*, 423 F.2d 104 (3d Cir. 1970). *Lauritzen* stands as a leading expansion of the *Petty-Parden* doctrine for the proposition that a state's participation in a federally controlled area will be deemed, *pro tanto*, a submission to federal law and a waiver of immunity. The Third Circuit has apparently abandoned its view first taken in *Red Star* and has adopted the Fourth Circuit's *Lauritzen* position. This is made apparent by a reading of the opinion in *Bartlett, supra*, where *Lauritzen* is cited by the Court of Appeals with approval for the proposition that whether a waiver of immunity has taken place is a question of federal law [454 F.2d at 625]. Unfortunately the appellate court failed to comment on this.

Judge Troutman also rejected [344 F. Supp. at 1345, 1346] as authority on the waiver of immunity issue, Judge Thornberry's opinion in *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971). Judge Thornberry said [446 F.2d at 1028]:

> No one forced the State [Texas] to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway. The State [of Texas], by entering into this venture, voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law.

There appears little basis for the distinction drawn by Judge Troutman that Texas in *San Antonio* sought to withdraw from the program, and thus avoid the operative provisions of the Act, whereas The Commonwealth merely seeks to withdraw from liability for failure to comply with the maintenance provisions of the statutes. Suffice to say, the Third Circuit's statement in *Bartlett, supra,* presents a *caveat* that, as here, where a state participates in a federal-aid highway program, accepts the benefits, and then attempts to reject the attendant obligations under the guise of immunity, such conduct will not be favorably received. The *Bartlett* court indicated that that issue was to be left for, ". . . definitive determination in a later case" [454 F.2d at 625]. We submit that this case calls for an answer to the question thus presented, but unanswered in *Bartlett*. The Commonwealth has hid, under the transparent cover of immunity all too long—now is the time for it to be called to the bar of this Court and required to answer for its derelictions.

III.

The Federal-Aid Highways Act and Highway Safety Act create an implied cause of action in favor of plaintiffs to recover for their injuries.

Here, too, a question of first impression is presented: Does an admitted violation by a participant state of its obligations under the Federal-Aid Highways Act and Highway Safety Act give rise to a private cause of action for personal injuries sustained by a user of the road? The Third Circuit did not comment on this question on appeal.

The concept that a federal statute otherwise silent as to any private remedy for its breach gives rise to an *implied* federal cause of action in favor of the injured party

has been recognized since 1916 [*Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33, 60 L. Ed. 874, 36 S. Ct. 482 (1916)].

> [D]isregard of the command of a statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . . [Id., 241 U.S. at 39].

(a) The Theory of the Implied Cause of Action:

Where a federally secured right is invaded, it is for the federal courts to adjust their remedies so as to grant necessary relief. *Bell* v. *Hood*, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773, 13 A.L.R. 2d 383 (1946); Katz, *The Jurisprudence of Remedies, Constitutional Legislation and the Law of Torts in Bell* v. *Hood*, 117 U. Pa. L. Rev. 1.

> [I]mplying a cause of action may increase the likelihood of compliance with the statute by giving victims incentive to assist in its enforcement and potential violators, faced with additional penalty, added reason to conform their conduct to it. The implied cause of action can also provide direct relief for members of a class that the legislature wished to protect. Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 Harv. L. Rev. 285, at 291 (1963).

In weighing whether to imply a cause of action the Court must not be unmindful of alternative remedies, *or lack of remedies*, available to the injured party. Id., 77 Harv. L. Rev. at 292. In the case at bar, it is clear beyond peradventure of doubt that the accident and resultant injuries resulted from the wrongful conduct of The Commonwealth. The bus driver, *Daye*, is without legal fault. If a right of recovery is denied *Meyers* by this Court on the

basis of an implied cause of action, it is obvious that the two innocent infant plaintiffs will never be compensated for their injuries. They will have experienced a 'wrong without a remedy'. The thought of such an injustice is intolerable.

Silence as to the availability of private remedies for breach of the Federal-Aid Highways Act and Highway Safety Act, should *not* be taken as a legislative mandate that implication of a private remedy should be denied. As noted in *Fagot* v. *Flintkote Co.*, 305 F. Supp. 407 (D.C. La. 1969):

> Where other statutes were similarly silent as to any private relief, courts have found a cause of action to exist—for violation, for example, of the Securities Exchange Act, National Banking Act, Federal Communications Act, and the Rivers and Harbors Act.

The legislation we are concerned with here seeks to protect the users of federal-aid highways. The right, we submit, is one of constitutional dimension, for the ability to engage in interstate commerce under the Commerce Clause requires that travel between states be free from the threat of, or actual injury at the hands of a foreign state.

The theory that every *right* protected is of value only if there is a corresponding *remedy* for its breach has found expression in the Supreme Court on many occasions. Most recently in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), the late Mr. Justice Harlan in his concurring opinion articulated the theory in these words [403 U.S. at 402, 29 L. Ed. 2d at 630, 91 S. Ct. at 2008]:

> Thus, in suits for damages based on violations of federal statutes lacking any express authorization of

> a damage remedy, the Court has authorized such relief where, in its view, damages are necessary to effectuate the Congressional policy underpinning the substantive provisions of the statute.

The *Bivens* Court thus instructs us to *look at the substantive social policy embodied in the legislation,* and then decide whether the implication of a private remedy would aid in the fulfillment of the act's goals. Would anyone quarrel with the notion that to hold The Commonwealth liable for the injuries it has caused would not be an impetus to prevent a recurrence? What is the old adage: those who refuse to learn from history are destined to relive it? To deny a right of recovery to the plaintiffs would be rewarding The Commonwealth for its irresponsible conduct.

The notion of an "implied" federal cause of action arising from activities involving interstate commerce is not new to the law. As Chief Judge Henry J. Friendly noted in his famous article, *In Praise of Erie,* 19 The Record of The Association of the Bar of The City of New York 64, 88 (1964):

> Statutes regulating the activities of interstate carriers are another fertile field for implication of rights and the filling of interstices. Fifteen years before *Erie* the Supreme Court had held that the Hepburn Act's prohibition against an interstate railroad's giving a pass to anyone except an employee and his family made the legal consequences of such a pass a matter of overriding federal decisional law "to the exclusion of state laws and state policies" [*Kansas City So. Ry.* v. *Van Zandt*, 260 U.S. 459, 469 (1923)].
>
> * * * * *
>
> So, it seems to me, the Supreme Court, in the years since *Erie*, has been forging a new centripetal tool incalculably useful to our federal system. It has

> employed a variety of techniques—spontaneous generation . . ., implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices. [Id. at 92].

Cases "implying" a federal cause of action to fill the "statutory interstices" in the words of Judge Friendly, and in order to give effect to the "reasons related to the substantive social policy embodied in an act of positive law" in the words of Mr. Justice Harlan, are now legion. See, Note, 77 Harv. L. Rev. 285 (1963), *supra*.

J. I. Case Co. v. *Borak*, 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), involved a violation of the Securities and Exchange Act of 1934. The statute did not, however, define the relief which could be obtained in a private suit for violation of its provisions. In fact, the statute did not even make any reference to a private right of action for a violation of its regulations. One thing was clear however: the purpose of the act—to protect the investors (just as the Highway Safety Act is aimed to protect users of the highways). In implying a right to relief by implication, the Court concluded that implication of a private cause of action was necessary to fulfill the purposes of the act. In concluding that the duty evolved on the federal courts to fashion remedies in order to protect federal rights, the Court observed [377 U.S. at 433, 12 L. Ed. 2d at 433, 84 S. Ct. at 1560]:

> We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.

The *Borak* decision has been analyzed as resting on three factors: (1) What are the protective purposes of the act

under review; (2) Absent is any clear contrary legislative expression against the implication of a private remedy, [see, Note, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy,* 48 Colum. L. Rev. 1090, 1094 (1948)], and (3) the federal courts are fulfilling its trust to grant protection of the statute to those intended by the legislature.

Further explaining the *Borak* approach, Mr. Justice Harlan explained in *Bivens, supra,* 403 U.S. at 402 fn. 4, 29 L. Ed. 2d at 630 fn. 4, 91 S. Ct. at 2008 fn. 4:

> The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. There we "implied"—from what can only be characterized as an "exclusively procedural provision" affording access to a federal forum . . . a private cause of action for damages for violation of § 14(a) of the Securities Act of 1934. . . . We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery has been provided * * * The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction . . . nor did the Borak Court purport to do so. . . . The notion of "implying" a remedy, therefore, . . . can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* remedies according to reasons related to the substantive social policy embodied in an act of positive law (emphasis supplied).

Implication of a federal cause of action is thus a safety valve available to the federal courts. It permits internal expansion of the protective aegis of a statute, where justice so dictates, and it restricts such expansion where to do so would overreach the intent or mandate of Congress.

(b) The Lower Courts' Views as to the Implied Cause of Action:

Judge Troutman summarily rejected any implication of a federal cause of action, without citation of any authority, by holding that, ". . . the Secretary is authorized to discontinue the apportionment of funds under the Act. Thus, the power of the federal government to cut off federal funds provides the only sanction expressly authorized under the Act." 344 F. Supp. at 1348. The Court of Appeals did not comment on this point.

In *Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969), action was brought by migratory workers for alleged violations of wage payments and working conditions. The act in *Gomez*, as the act under review here, provided that the only *express* remedy for a violation by a participant state was for the Secretary to cut off the flow of federal funds to that state. Holding the mere cutting off of federal funds to the violating state to be inadequate relief, and a remedy which would in no way benefit the workers injured, and in creating an implied cause of action in favor of the workers, the *Gomez* court said [417 F.2d at 576]:

> This Act, its setting and the regulations call imperatively for implied remedies here if the purpose of the regulations—the protection of migratory farm workers—is to be achieved. * * * Absent an implied remedy, the workers have no protection. They would not have even the protection of a criminal sanction. * * *
>
> *It is unthinkable that Congress, obviously concerned with people, would have left the Secretary with only the sanction of cutting off funds to the state.*
>
> Moreover, the private civil remedy is a method of policy enforcement long honored explicitly in statutes and by implication with the help of courts (emphasis added).

The *Gomez* opinion, in reviewing a statute similar to that in the instant case as far as providing for *express* remedies for a breach, reached the opposite conclusion to that of Judge Troutman in the case under review here. The *Gomez* result, we believe, is the sounder view. To imply a civil remedy to the plaintiffs here does not appear offensive to the senses, but to the contrary, commends itself as giving voice and hand to the undeniable intent of the Highway Safety Act—to foster the safety of federal-aid highways for users such as the plaintiffs here.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1973.

APPENDIX

Judgment (3rd Circuit)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[SAME TITLE]

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, GIBBONS and ROSENN,
Circuit Judges

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 30, 1972, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

August 3, 1973

Certified as a true copy and issued in lieu of a formal mandate on August 27, 1973 in Nos. 72-1769 and 72-1840.

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

Costs taxed in favor of appellees Anckaitis, et al. in No. 72-1769 as follows:

Brief for appellees $100.70

Opinion (District Court)

Opinion (3rd Circuit)

[*For the Convenience of Court and Counsel this Exhibit is printed on the following pages.*]

Hubert DAYE et al.

v.

...e COMMONWEALTH OF PENNSYLVANIA et al.

...lindy MEYERS, an infant, by her parent and natural guardian, Marvin Meyers, et al.

v.

The COMMONWEALTH OF PENNSYLVANIA.

Civ. A. Nos. 71-1726, 71-2167.

United States District Court, E. D. Pennsylvania.

June 30, 1972.

...Actions against state and others to ...ver damages on account of highway ...dent. The District Court, Troutman, ...eld, inter alia, that Pennsylvania did ...waive its Eleventh Amendment im...ity by voluntarily applying for and ...pting federal funds and by entering ...interstate commerce in construction ...terstate highways.

Dismissed.

1. Courts ⇐307(1)

State is not a person for purposes of diversity jurisdiction.

2. Courts ⇐307(1)

State cannot waive its lack of status as citizen for diversity jurisdiction purposes.

3. Courts ⇐282(1), 284

Questions whether state's accepting highway grants and its entry into field of interstate commerce constituted waiver of Eleventh Amendment immunity and whether alleged violations of federal highway statutes gave rise to cause of action for damages presented federal questions sustaining jurisdiction in action against state arising out of highway accident. U.S.C.A.Const. Amend. 11.

4. Federal Civil Procedure ⇐161

Plaintiff has burden to establish right to proceed as class.

5. Federal Civil Procedure ⇐181

Action by bus driver, bus company, and others against state arising out of highway accident could not be maintained on behalf of class consisting of passengers killed or injured, since plaintiffs were not members, there was substantial question of adequacy of representation, damages would differ as to different members, and members had interest in individually controlling prosecution of separate actions. U.S.C.A. Const. Amend. 11.

6. Federal Civil Procedure ⇐164

Plaintiff-representative must be member of class which he purports to represent.

7. Federal Civil Procedure ⇐164

Adequacy of representation not only requires coextensive interest between class and its representatives but also absence of antagonistic interests.

8. Courts ⇐303(1)

Eleventh Amendment denies authority to federal courts to entertain suit by private parties against state without its consent. U.S.C.A.Const. Amend. 11.

9. Courts ⇐303(1)

Mere presence of federal question does not divest state of Eleventh Amendment immunity. U.S.C.A.Const. Amend. 11.

10. Courts ⇐303(1)

State may consent to be sued in federal court and thereby waive its immunity but waiver will be found only where stated in most express language or presented by such overwhelming implication from text so as to leave no room for any other reasonable construction and plaintiff has heavy burden to show waiver. U.S.C.A.Const. Amend. 11.

11. Courts ⇐303(1)

Pennsylvania did not waive its Eleventh Amendment immunity, with respect to action arising out of highway accident, by voluntarily applying for and accepting federal funds and by entering into interstate commerce in construction of interstate highways. 23 U.S.C.A. § 101 et seq.; U.S.C.A.Const. Amend. 11.

12. Automobiles ⇐253

Neither the Federal-Aid Highway Act nor the Highway Safety Act create implied cause of action to recover for personal injury sustained as a result of statutory standards or regulations promulgated thereunder. 21 U.S.C.A. §§ 106(a), 109(a, d, e), 114(a), 116(a, c); 23 U.S.C.A. § 402(a, c).

13. Automobiles ⇐290

Officers of Pennsylvania Department of Transportation were immune from liability with respect to highway accident, in absence of allegation of malice or wanton and reckless conduct.

14. Courts ⇐359

Whether Pennsylvania Department of Transportation is immune from tort liability is question of state law.

15. Automobiles ⇐252

Pennsylvania Department of Transportation was protected by governmental immunity from liability arising out of highway accident. 71 P.S.Pa. § 511.

16. Courts ⇐96, 365(2)

District court was bound by recent decision of Pennsylvania Supreme Court maintaining doctrine of governmental immunity and by Court of Appeals decision expressly refusing to reexamine doctrine.

James Zane, New York City, for plaintiffs

Richard Stevens, Allentown, Pa., for plaintiffs

D. J. Ryan, Philadelphia, Pa., Edward A. Hosey, Asst. Atty. Gen., Harrisburg, Pa., for defendant Com. of Pa.

OPINION AND ORDER

TROUTMAN, District Judge.

I.

On July 15, 1970, a chartered bus, carrying a group of school-age children and their counsellors, left Lawrence, New York, enroute to the Pennsylvania Dutch country. In an intermittent rain, the bus proceeded in a westerly direction along U.S. Route 22 (Interstate 78) in Pennsylvania [hereinafter U.S. 22]. The wet pavement allegedly precipitated a skid, causing the bus to rotate clockwise 180°, crash into the guardrails, and tumble over an embankment. As a result of the accident, seven students were killed and forty-seven others injured.

Thereafter, two suits, arising out of this accident, were instituted in this Court against the Commonwealth of Pennsylvania. The first suit purports to be a class action, filed by Hubert Daye (the bus driver) and Tedesco Bus Company (the bus owner), each in their own right and on behalf of all passengers on the bus at the time of the accident. [Daye] The second suit was filed on behalf of two children who were passengers in the bus and injured in the ac-

cident. Both actions base the liability of the Commonwealth on its alleged failure to use reasonable care in the design,[1] construction [2] and maintenance [3]

1. 23 U.S.C. § 106(a) provides:
"(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title."
23 U.S.C. § 109(a) provides:
"(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality."
23 U.S.C. § 109(d) provides:
"(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways."
23 U.S.C. § 109(e) provides:
"(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made."

2. 23 U.S.C. § 114(a) provides:
"(a) The construction of any highways or portions of highways located on a Federal-aid system shall be undertaken by the respective State highway departments or under their direct supervision. Except as provided in section 117 of this title, such construction shall be subject to the inspection and approval of the Secretary. The construction work and labor in each State shall be performed under the direct supervision of the State highway department and in accordance with the laws of that State and applicable Federal laws. Construction may be begun as soon as funds are available for expenditure pursuant to subsection (a) of section 118 of this title. On any project where actual construction is in progress and visible to highway users, the State highway department shall erect such informational sign or signs as prescribed by the Secretary, identifying the project and the respective amounts contributed therefor by the State and Federal Governments."

3. 23 U.S.C. § 116(a) provides:
"(a) It shall be the duty of the State highway department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system."
23 U.S.C. § 116(c) provides:
"(c) If at any time the Secretary shall find that any project constructed under the provisions of this chapter, or constructed under the provisions of prior Acts, is not being properly maintained, he shall call such fact to the attention of the State highway department. If, within ninety days after receipt of such notice, such project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the entire State until such project shall have been put in proper condition of maintenance, unless such project is subject

of U.S. Route 22 in violation of the Federal-Aid Highway Act, 23 U.S.C. § 101 et seq., and the Highway Safety Act, 23 U.S.C. § 401 et seq.[4] Specifically, the gravamen of plaintiffs' allegations is that in the light of the high number of reported accidents along this portion of U.S. 22, the Commonwealth failed to use reasonable care to prevent the drainage of surface water across the roadway and to insure the installation of adequate guardrails[5].

The Commonwealth has moved to dismiss both complaints on three grounds, alleging that (1) the Court lacks jurisdiction to entertain these actions; (2) these actions are barred by the Commonwealth's immunity under the Eleventh Amendment,[6] and its sovereign im-

to an agreement pursuant to subsection (b) of this section, in which case approval shall be withheld only for secondary or urban projects in the county or municipality where such project is located."

4. 23 U.S.C. § 402(a) provides:

"(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary. Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance. In addition such uniform standards shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, and emergency services. Such standards as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations. The Secretary shall be authorized to amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis by one or more States, where the Secretary finds that the public interest would be served by such amendment or waiver."

5. The plaintiffs in the *Meyers* case have incorporated into their brief the Highway Accident Report of the National Safety Board, whose conclusions we shall accept for the purpose of these motions. As to the probable cause of this accident, the Board concluded:

"The National Transportation Safety Board determines that the probable cause of this accident was either dynamic or viscous hydroplaning of the front wheels of the bus which initiated a skid from which the driver could not recover. Contributing factors included low basic skid resistance of the pavement in wet weather, and the probable presence of water draining across the pavement in an abnormal manner. The fatalities and injuries were caused by an ineffective highway guardrail which failed to prevent the bus from rolling down an embankment, by bus windows which failed to prevent ejection of some passengers, and in some cases, by the absence of occupant restraints."

For the purpose of these motions we shall not refer to other portions of the report suggesting additional or other contributing causes of this unfortunate accident.

6. The Eleventh Amendment to the United States Constitution provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

Thus, under the Eleventh Amendment the federal courts lack authority to entertain a suit brought by a private party against a state without its consent. Ford Motor Co. v. Dep't. of Treasury, State of Indiana, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

munity;[7] and (3) the complaint fails to state a claim upon which relief can be granted. Plaintiffs, on the other hand, argue that by voluntarily accepting federal funds under the Federal-Aid Highway Act and by entering into interstate commerce in the construction of interstate highways, the Commonwealth waived any immunity which ordinarily would have been available to it. Plaintiffs further argue that the Federal-Aid Highway Act and the Highway Safety Act create an implied cause of action for injuries resulting from any violation of the standards set forth therein or regulations promulgated thereunder.

A. *Jurisdiction*

[1, 2] Both actions have alleged as their jurisdictional basis a federal question arising under the Constitution and laws of the United States. In the *Daye* case, plaintiffs have alleged diversity of citizenship as an alternative jurisdictional basis. In so far as jurisdiction over the Commonwealth in *Daye* is based on diversity of citizenship, this Court lacks such jurisdiction, for it is well established that a state is not a person for the purposes of diversity jurisdiction. State Highway Comm'n. of Wyoming v. Utah Construction Co., 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1929); O'Neill v. Commonwealth of Pennsylvania, 459 F.2d 1 (3rd Cir., 1972). Moreover, a state cannot waive its lack of status as a citizen for the purpose of diversity jurisdiction. Harris v. Pennsylvania Turnpike Comm'n., 410 F.2d 1332, 1334 n.1 (3rd Cir. 1969), cert. denied, 396 U.S. 1005, 90 S.Ct. 558, 24 L.Ed.2d 497 (1970); Krisel v. Duran, 386 F.2d 179, 181 (2d Cir. 1967), cert. denied 390 U.S. 1042, 88 S.Ct. 1635, 20 L.Ed.2d 303 (1968).

[3] Plaintiffs have alleged that this Court has jurisdiction over these actions in that their subject-matter raises substantial federal questions. Initially, plaintiffs argue that the issue whether the Commonwealth waived its Eleventh Amendment immunity presents a federal question. In Parden v. Terminal R. Co. of Ala., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), the Supreme Court considered this identical question, holding:

> "Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law." 377 U.S. at 197, 84 S.Ct. at 1215.

See also Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen, 404 F.2d 1001, 1003–1004 (4th Cir. 1968). In the instant case, the issue whether Pennsylvania's affirmative actions in accepting federal highway grants and in its entry into the field of interstate commerce constitutes a waiver of its Eleventh Amendment immunity manifestly presents a federal question within the purview of the *Parden* decision.

In further support of this Court's jurisdiction, plaintiffs maintain that the issue whether a violation of the standards established in the Federal-Aid Highway Act or the Highway Safety Act gives rise to an implied cause of action to recover damages for personal injuries also constitutes a federal question. We conclude that this issue presents a federal question, for in Smith v. Kansas City Title & Trust Co., 255

7. Article 1, Section 11 of the Pennsylvania Constitution, P.S., provides:
"• • • Suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the Legislature may by law direct." The Pennsylvania courts have held that in the absence of a statute authorizing suits against the Commonwealth, the state is immune from the negligence of its agents and employees on the construction, maintenance and repair of a highway. Rader v. Pennsylvania Turnpike Comm'n., 407 Pa. 609, 611, 182 A.2d 199 (1962).

U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921), the Supreme Court stated the test as follows:

> "[W]here it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction * * *". 255 U.S. at 199, 41 S.Ct. at 245.

Since plaintiffs' right to relief, if any, depends on our construction of the federal highway legislation, we have jurisdiction to determine whether such statutes create, by implication, a cognizable civil remedy.

B. *The Class Action*

[4, 5] In the *Daye* case, the named plaintiffs, Hubert Daye, Tedesco Bus Company, Frank Tedesco, and Academy Charter Service, Inc., purport to represent a class consisting of those passengers killed or injured in the accident of July 15, 1970. In order to proceed as a class, the burden is on the plaintiff to establish the right to do so. Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 457 (E.D.Pa. 1968). In the instant case, plaintiffs must satisfy the prerequisites of Rule 23(a) [8] and Rule 23(b) (3) [9] of the Federal Rules of Civil Procedure. Plaintiffs vigorously argue that since the liability of the Commonwealth of Pennsylvania is a question common to all members of the purported class and since this question predominates over all others, this suit is appropriate for determination as a class action. Several considerations, however, have convinced us that this suit is not properly maintainable as a class action.

[6, 7] Initially, it is well established that the plaintiff-representative must be a member of the class which he purports to represent. Bailey v. Patterson, 369 U.S. 31, 32–33, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962). In this case, the purported class consists of those injured or killed in the bus accident in question. The only named plaintiff who could conceivably represent this class as a member is Hubert Daye, the driver himself. The remaining named plaintiffs are, in no way, representative of this class. Secondly, there arises a substantial question of adequacy of representation by the named plaintiffs. Adequacy of representation not only requires a coextensiveness of interests between the class and its representatives (present here in the common question of the liability of Pennsylvania), but also requires an absence of antagonistic interests. 3B J. Moore, Federal Practice ¶23.07 [1], ¶23.07[3] (2d ed. 1969). Several ac-

8. Rule 23(a) F.R.Civ.P. provides:
> "(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

9. Rule 23(b) (3) F.R.Civ.P. provides:
> "(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

tions, arising from this accident, have already been filed against the bus company not only in this Court, but also in New York. Thirdly, we have found the Notes of the Advisory Committee to Rule 23 as revised in 1966 instructive. There, the Committee noted that "mass accidents" resulting in injuries to numerous persons are ordinarily inappropriate because of the likelihood that significant questions would arise not only of damages, but also of liability and defenses to liability. To permit such cases to continue as class actions, the Committee continued, would cause the case to degenerate into multiple law suits separately tried. *See also* Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa.1970). In this instant case, this Court would be confronted with not only personal injury claims but also death claims. Moreover, assuming the Commonwealth is found liable, the measure of damages may differ in each instance in that the class would consist of members from both New York and New Jersey. Finally, we must consider the interest of the members of the class in individually controlling the prosecution of separate actions, Rule 23(b) (3) (A), and the extent and nature of any litigation concerning the controversy already evident from the commencement of actions by members of the class, Rule 23(b) (3) (B). As previously mentioned, the representative parties have been sued by at least six members of the class in the courts of New York, and two members of the Class [Meyers] have filed suit in this Court against the Commonwealth. In the light of the significant number of actions already commenced, it is reasonable to conclude that each member of the purported class has a substantial interest in controlling his own litigation. Moreover, it is illogical to conclude that one who is a defendant in other actions instituted by members of the class and arising out of the same accident could here adequately and properly represent the class as plaintiffs. For these reasons, we conclude that this action is not maintainable as a class action in that it fails to meet the prerequisites set forth in Rule 23 of the Federal Rules of Civil Procedure. Accordingly, we will dismiss the *Daye* complaint in so far as it alleges a class action.

C. *The Eleventh Amendment Waiver*

[8–10] The Eleventh Amendment expressly denies authority to the federal courts to entertain a suit brought by private parties against a state without its consent. Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945). The mere presence of a federal question does not, in and of itself, divest a state of its immunity under the Eleventh Amendment. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1899). The state may, however, consent to be sued in federal court and, thereby, waive its immunity under the Eleventh Amendment. Where the issue of waiver arises, the general rule is that a waiver of immunity will be found only where stated in the most express language, or where presented by such overwhelming implication from the text so as to leave no room for any other reasonable construction. Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 53 L.Ed. 742 (1909); DeLong Corp. v. Oregon State Highway Comm'n., 233 F.Supp. 7 (D.Or.1964). Furthermore, a heavy burden is on the plaintiff to show an "intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). See also Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); DeLong Corp. v. Oregon State Highway Comm'n., *supra*, 233 F.Supp. at 19.

Plaintiffs argue that the Commonwealth of Pennsylvania has impliedly waived its Eleventh Amendment immunity,[10] relying on Petty v. Tennes-

10. Plaintiffs have not designated nor have we found any express waiver of the Commonwealth's Eleventh Amendment immunity either in the Pennsylvania stat-

see-Missouri Bridge Comm'n., 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959); Parden v. Terminal R. Co. of Ala., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) and their progeny. Specifically, plaintiffs argue that the Commonwealth waived its immunity by implication by affirmatively and voluntarily (1) applying for and accepting federal funds under the Federal-Aid Highway Act, 23 U.S.C. § 101 et seq., and (2) engaging in interstate commerce. We now examine the cases cited by plaintiffs to determine whether they provide authority to imply a waiver of the state's immunity under the facts and circumstances of this case.

In Petty v. Tennessee-Missouri Bridge Comm'n., 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959), plaintiff brought suit under the Jones Act, 46 U.S.C. § 688, to recover damages for the death of her husband aboard defendant's ferry boat. Defendant was a bi-state agency created by an interstate compact between Tennessee and Missouri pursuant to Article I, Section 10 of the Constitution. The Commission was given the power "to contract, to sue and be sued in its own name". Further, in approving the compact, Congress added a proviso to the effect that the terms of the contract would not be construed "to affect, impair, or diminish any right, power or jurisdiction of * * * any court * * * of the United States, over or in regard to any navigable waters, or any commerce between the States * * *." The Supreme Court held initially that since the alleged waiver was contained in an interstate compact, its interpretation was a matter of federal law. Thereafter, the Court construed the congressional proviso as a deliberate reservation of jurisdiction in the federal court and concluded that the "sue and be sued" clause of the compact constituted a waiver of the state's immunity from suit. We find *Petty* inapposite to the facts of this case for several reasons. First, we read the language of the interstate compact and the Court's construction thereof to constitute an express waiver of Eleventh Amendment immunity. In the instant case, there is nothing even remotely similar to a sue or be sued clause or a reservation of jurisdiction in any of the applicable statutes. Secondly, under the terms of the agreement, the bi-state agency was operating over navigable waters—an area exclusively within the federal regulatory domain. Moreover, under the terms of the compact, federal jurisdiction over actions arising in navigable waters was expressly reserved, and Congress, under the Jones Act, had provided an express cause of action for torts occurring thereon. The compact was described as involving the "* * * launching of a governmental corporation into an industrial or business field * * *". 359 U.S. at 280, 79 S.Ct. at 789. In the instant case, the Commonwealth was operating exclusively within its own borders in an area traditionally within the state's regulatory domain. Congressional regulation in this area is limited to the controls it has secured under the Federal-Aid Highways Act, and this act provides no express cause of action to recover damages for personal injuries. Thus, we have concluded that *Petty* has little effect outside of its own limited factual situation and does not support the proposition of waiver in this case.

In Parden v. Terminal R. Co. of Alabama, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) the Supreme Court expanded the rationale of *Petty*, holding that a state-owned and operated railroad, competing with privately-owned railroads in interstate commerce, is liable for personal injuries under the Federal Employers' Liability Act. The Court rejected the state's Eleventh Amendment immunity argument, reasoning that the state's operation of a railroad in interstate commerce must be in

utes, the application for and acceptance of federal highway funds, or in the appropriate federal statutes. Any waiver of the state's immunity, therefore, is limited to waiver by implication.

subordination to the power of the federal government to regulate such commerce. By empowering Congress to regulate commerce, the states necessarily surrendered any portion of their sovereignty which would stand in the way of such regulation. We also conclude that *Pardon* is inapposite under the facts of the present case. First, in *Pardon*, the state, in operating its railroad across interstate boundaries, was acting in the capacity of a private enterprise and entered into the domain of exclusive federal regulation. In the case at bar, the state was performing its traditional state governmental function in designing, constructing, and maintaining highways within its own boundaries. Secondly, Congress in the FELA expressly conditioned the right to operate a railroad upon amenability to suit in federal court and created a specific cause of action to recover for personal injuries. In the instant case, the Commonwealth has received funds for interstate highways under a federal statutory scheme which provides no express and suggests no implied cause of action for violation of its provisions. We, therefore, conclude that *Pardon* does not mandate a finding of waiver under the present facts.

Plaintiffs also rely on Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968). In *Lauritzen*, a shipowner sued the Bridge and Tunnel District, a political subdivision of the Commonwealth of Virginia, for damages when the hull of his ship struck a submerged light tower at the bridge-tunnel spanning the Chesapeake Bay. As required by federal statute, 33 U.S.C. § 401, the District submitted plans to the Army Corps of Engineers for the approval of the bridge-tunnel and received a permit to begin construction. In rejecting the State's Eleventh Amendment immunity argument, the Court of Appeals held:

> "The supplication of the State, and her reception into the Federal domain, meant surrender, pro tanto and pro tempore, of State sovereignty and submission to the paramount overlordship of the United States during the tenancy." 404 F.2d at 1003.

The result reached in *Lauritzen* was rejected by the Third Circuit in Red Star Towing & Transp. Co. v. Dep't. of Transp. of New Jersey, 423 F.2d 104 (3rd Cir. 1970), where the Court upheld the Eleventh Amendment immunity of the State of New Jersey on a virtually identical fact situation. The Court specifically disapproved of the contrary result reached in *Lauritzen*, holding it "arbitrary to say that the State consents to civil liability that could not be anticipated by reading the relevant federal statute". 423 F.2d at 106. Additionally, *Lauritzen* is strikingly similar to *Petty*, which we have previously found inapposite, in that the District's charter contained a "sue and be sued" clause, and the District entered into an exclusive realm of federal regulation--navigable waters.

Consequently, we conclude that *Petty*, *Pardon* and *Lauritzen* do not support plaintiffs' theory of waiver, and plaintiffs cannot by a Procrustean stretch place themselves within the purview of those cases. We shall now undertake an independent analysis of plaintiffs' argument that by accepting federal funds under the Federal-Aid Highway Act and, thereby, entering into interstate commerce, the Commonwealth waived its Eleventh Amendment immunity.

1. *Acceptance of Federal Funds*

Plaintiffs argue that by participating in the federal highway program and by seeking and accepting funds thereunder, the state waived its immunity from suit. Plaintiffs rely heavily on Named Individual Members of San Antonio Conservation Soc'y. v. Texas Highway Dep't., 446 F.2d 1013 (5th Cir. 1971). Commencing in *1955* the Texas Highway Department planned and thereafter sought and obtained the approval of federal funds for a highway project extending from the San Antonio airport to San Antonio and through certain parklands. Upon objection by conservationists, in the course of tortious litigation in the

federal courts, and following a stay order entered by the Court on *May 27, 1971*, the Texas Highway Department, on June 1, 1971, sought to withdraw the project from all federal aid or involvement stating that the project would be completed exclusively with state funds. The Court understandably and logically responded that having voluntarily committed itself to this federally-aided project, the state was bound by federal law under the Supremacy Clause, United States Constitution, Art. VI, Cl. 2, and could not circumvent applicable federal statutes by belatedly suggesting the exclusive application of state funds. The Eleventh Amendment immunity was neither raised nor discussed and we find the decision unpersuasive and not controlling in the context of the instant case.

In Road Review League v. Boyd, 270 F.Supp. 650 (S.D.N.Y.1967),[11] and in DeLong Corp. v. Oregon State Highway Commission, 233 F.Supp. 7 (D.Ore. 1964), aff'd. 343 F.2d 911 (9th Cir. 1965), cert. denied, 382 U.S. 877, 86 S. Ct. 161, 15 L.Ed.2d 119 (1965),[12] the courts held that by participating in the federal highway program and seeking federal funds, the state does not waive its immunity from suit. In *DeLong*, the Court reasoned that any waiver of immunity must be made expressly or by overwhelming implication, and the mere acceptance of funds under the Federal-Aid Highway Act demonstrated neither express nor implied waiver. Although the factual situations of these cases differ from that in the instant case, their reasoning is highly pertinent, and we specifically adopt their holdings.

2. *Entry into Interstate Commerce*

Plaintiffs, alternatively, argue that the state, in constructing an interstate highway, has voluntarily entered into the federally regulated area of interstate commerce and, therefore, is amenable to suit for its acts or omissions in violation of federal regulations. Initially, it should be noted that the mere entry of a state into a field of congressional regulation will not subject it to suit by private individuals. Red Star Towing & Transp. Co. v. Dep't. of Transp. of New Jersey, *supra*, 423 F.2d at 106. In Mahler v. United States, 306 F.2d 713 (3rd Cir.) cert. denied 371 U.S. 923, 83 S.Ct. 290, 9 L.Ed.2d 231 (1962), the Court of Appeals stated:

> "But it is clear nonetheless that the construction, maintenance and the regulations of highways have remained state functions. South Carolina [State] Highway Dep't. v. Barnwell Bros., 303 U.S. 177, 187, 58 S.Ct. 510, 514, 82 L.Ed. 734 (1938). In the cited case Mr. Justice Stone said: 'From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. Minnesota Rate Cases [Simpson v. Shepard], 230 U.S. 352, 416 [33 S. Ct. 729, 57 L.Ed. 1511]." 306 F.2d at 716.

We have heretofore emphasized the fact that the Commonwealth, in constructing federal aid highways, has operated solely within its borders. This is because in the absence of federal regulation, the state may regulate its own intrastate activities, notwithstanding their effect on interstate commerce. Under the law of Pennsylvania, the Commonwealth is "immune for liability in trespass for the negligence of its agents and employees in the construction, maintenance and re-

11. In Road Review League v. Boyd, 270 F.Supp. 650 (S.D.N.Y.1967), a conservation group challenged the determination of the Federal Highway Administrator, who approved the proposed route for a portion of the interstate highway.

12. In DeLong Corp. v. Oregon State Highway Comm'n., 233 F.Supp. 7 (D.Ore. 1964), a contractor sued the state through the state highway commission for a declaration of rights regarding the provisions of a contract for the construction of an interstate bridge.

pair of a highway." Rader v. Pennsylvania Turnpike Comm'n., 407 Pa. 609, 611, 182 A.2d 199, 200 (1962). There is no Pennsylvania statute waiving its Eleventh Amendment or sovereign immunity to a suit in trespass for negligence in the construction of either a state or interstate highway. In the absence of a statutory waiver by the state, we turn our attention to the question whether under the Federal-Aid Highway Act, 23 U.S.C. § 101 et seq. and the Highway Safety Act, 23 U.S.C. § 401 et seq., Congress has acted in such a manner as to condition the state's entry into commerce upon its waiver of immunity and has provided a cause of action for a breach of its provisions.

D. *The Federal Highway Statutes*

Neither the Federal-Aid Highway Act, 23 U.S.C. § 101 *et* seq., nor the Highway Safety Act expressly authorize a suit or cause of action for violation of their provisions. Plaintiffs argue that a cause of action is implied in that damages are necessary to effectuate the Congressional policy underlying the substantive provisions of those acts.

Plaintiffs' first claim is under the Federal-Aid Highway Act, in which several provisions are designated by plaintiffs as requiring this Court to imply a cause of action. Section 106(a) provides for the submission by the state and approval by the United States Secretary of Transportation [Secretary] of surveys, plans, specifications and estimates for each proposed project. Section 109(a) provides that the Secretary shall not approve the plans and specifications unless they are conducive to traffic needs, safety, durability and economy. Section 109(d) provides that the location of highway signs shall be subject to the approval of the State Highway Department with the concurrence of the Secretary. Section 109(e) provides that no funds shall be approved unless proper safety protective devices complying with certain safety standards approved by the Secretary are installed. Section 111(a) provides that highway construction shall be under the supervision of the State Highway Department, subject to the inspection and approval of the Secretary. Section 116(a) provides that it is the duty of the state to maintain the highways, and Section 116(c) provides that if the highway is not being properly maintained, the Secretary may withhold approval of further projects.

The statutory language of the Federal-Aid Highway Act clearly indicates that the ultimate responsibility for any safety provisions under the Act lies with the Secretary. The Secretary is given the power to withhold his approval in the event the design or construction of the highway does not meet applicable federal standards. Moreover, the Secretary is empowered to withhold funds for future projects in the event the highway is not being properly maintained. Consequently, the statutory language militates against the implication of a private remedy in that the express sanction provided in the Act is disqualification of the state for federal funds. It is noteworthy that the circumstances which would disqualify the state are in no way declared unlawful. Moreover, the congressional policy underlying the Act does not mandate an implied private cause of action. In Mahler v. United States, *supra*, the Third Circuit undertook an extensive and exhaustive review of the legislative history of the Act and concluded:

> "It seems clear from the Acts of Congress and their accompanying legislative history, that grants-in-aid under the Federal Highway Program were and are designed to encourage states to construct their own highways and that the primary function of the Bureau of Public Roads, in approving plans submitted to it by a state and inspecting roads during and after construction, is that of making sure that federal appropriations are being utilized properly and efficiently by the respective states and are not being wasted." 306 F.2d at 716.

The Court then concluded in the light of the legislative history that the Act imposes no duty on the United States running to private persons. Since the purpose of the Act is the protection of federal investment, and the sanctions provided therein are directed to fulfill such purpose, we conclude that the Act imposes no duty and no liability on the state other than those specified therein and gives rise to no private cause of action.

Secondly, plaintiffs claim that a private cause of action exists under Section 402(a) of the Highway Safety Act, 23 U.S.C. § 402(a),[13] and the regulations promulgated thereunder.[14] Section 402 (a) authorizes the Secretary to establish uniform standards of performance criteria. Under the applicable standard regarding highway design, construction and maintenance, each state program shall provide standards for pavement design and construction with specific provisions for high skid resistance qualities; a resurfacing program with emphasis on roads with low skid resistance and high accident rates; and guardrailings which will minimize the severity of impact and retain the vehicle.

The purpose of the Act and its regulations is manifest on its face—highway safety. The Act, however, was initially passed in 1966, while the highway in question was originally constructed in 1958. Thus, the provisions of the Act and regulations pertaining to safety programs in the initial design and construction of a federal aid highway are inapplicable, leaving only those involving resurfacing and corrections of areas with low skid resistance and high accident rates pertinent here.

A reading of the language of the regulation indicates that the establishment of such programs is directory rather than mandatory. In order to receive federal aid under this section, the state is directed to implement such a highway safety program. 23 U.S.C. § 402(c). Without such a program, the Secretary is authorized to discontinue the apportionment of funds under the Act. Thus, the power of the federal government to cut off federal funds provides the only sanction expressly authorized under the Act. We, therefore, conclude that the Highway Safety Act creates no duty on behalf of the states running toward these plaintiffs and creates no private action for breach thereof.

E. *Conclusion*

[11, 12] Plaintiffs argue that under the facts of this case the Commonwealth waived its Eleventh Amendment immu-

13. *See* note 4 *supra*.

14. Pursuant to this provision, the United States Bureau of Transportation promulgated certain uniform safety standards, 23 C.F.R. ch. 2. Those standards applicable to the instant case are set forth in Highway Safety Program Standard No. 12, which provides in pertinent part:

"HIGHWAY DESIGN, CONSTRUCTION AND MAINTENANCE

Every state in cooperation with county and local governments shall have a program of highway design, construction and maintenance to improve highway safety. Standards applicable to specific programs are those issued or endorsed by the Federal Highway Administrator.

I. The Program shall provide, as a minimum, that:

. . . . .

D. There are standards for pavement design and construction with specific provisions for high skid resistance qualities.

E. There is a program for resurfacing or other surface treatment with emphasis on correction of locations or sections of streets and highways with low skid resistance and high or potentially high accident rates susceptible to reduction by providing improved surfaces.

. . . . .

J. There are highway design and construction features wherever possible for accident prevention and survivability including at least the following:

. . . . .

4. Bridge railings and parapets which are designed to minimize severity of impact, to retain the vehicle, to redirect the vehicle so that it will move parallel to the roadway, and to minimize danger to traffic below."

nity and that the federal highway acts provide, by implication, a private cause of action. Plaintiffs have failed to meet their heavy burden and, in effect, have attempted to pile Pelion upon Ossa to reach Olympus. We, therefore, hold: (1) in voluntarily applying for and accepting federal funds under the Federal-Aid Highway Act and in entering into interstate commerce in the construction of interstate highways, the Commonwealth has not waived its Eleventh Amendment immunity; and (2) neither the Federal-Aid Highway Act nor the Highway Safety Act create an implied cause of action to recover damages for personal injuries sustained as a result of a violation of the standards set forth therein or regulations promulgated thereunder. Accordingly, the motion of the Commonwealth of Pennsylvania to dismiss the complaints as they are applicable to it will be granted.

II.

In addition to the Commonwealth of Pennsylvania, the Daye complaint has named individual officers of the Pennsylvania Department of Transportation as party-defendants. Jurisdiction over these parties is based on diversity of citizenship and the alleged liability of the individual defendants is based on negligence. Thus, the issue remains as to liability of the public officers arising from their alleged nonfeasance in failing to insure proper drainage and adequate guardrails along U. S. 22 in the light of the high number of reported accidents at this precise location of the route.

We are cognizant of a substantial split of authorities among the states on the issue of tort liability of public officers,[15] and the compelling arguments both in favor of and against the immunity of public officers. We are constrained, however, under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) to apply the substantive law of Pennsylvania. In Yealy v. Fink, 43 Pa. 212 (1862), the Supreme Court of Pennsylvania first enunciated the general rule that public officers, acting within the scope of their authority, are immune from tort liability so long as their act was not malicious or so wanton and reckless as to prove it was malicious. Under that rule, the Court maintained that a mistake in judgment was not sufficient to render public officials liable in damages, and the courts were directed not to review the judgment of such officials while they act within the scope of their authority. 43 Pa. at 217. This rule was reiterated in Burton v. Fulton, 49 Pa. 151 (1865) and has been consistently applied to the present date. Waters v. Evans, 47 Pa.Dist. & Co.R.2d 419 (1969); Thomas v. Osborn, 39 Pa.Dist. & Co.R.2d 472 (1966). In Highway Paving Co. v. Hausman, 171 F.Supp. 768 (E.D.Pa.1959), the District Court construed the Pennsylvania cases as holding that:

> "[P]ublic officials acting within the scope of their authority are not answerable in damages for the consequences of their acts unless done maliciously and with intent to injure." 171 F.Supp. at 770.

Moreover, this rule has been applied not only to affirmative acts of officials, but also to their inaction or nonfeasance. Thomas v. Osborn, *supra*, 93 Pa.Dist. & Co. R.2d at 473.

[13] The Pennsylvania courts have applied the foregoing principle to a myriad of factual situations, none of which are directly on point.[16] We are con-

15. *See* 40 A.L.R. 39, supplemented at 57 A.L.R. 1037. *See also* Harper & James, The Law of Torts, Vol. 2 § 29.8; Prosser, Handbook of the Law of Torts (4th Ed.) § 132.

16. The immunity of public officials has been applied to bar actions in the following instances: official's decision to construct a causeway rather than a bridge which resulted in water damage to the property of a downstream owner, Yealy v. Fink, *supra*; the dismissal of a school principal by school directors without assigning a cause therefor, Burton v. Fulton, *supra*; action by an unsuccessful bidder on a state materials contract, Highway Paving Co. v. Hausman, *supra*;

vinced, however, that the pervasive application of the rule indicates that the Pennsylvania courts would likewise apply it to the facts here involved. Since plaintiffs have not specifically alleged in their complaint malice or wanton and reckless conduct which is tantamount to malice as to the individual defendants, we conclude that they are immune from suit. Accordingly, the motion of the individual defendants to dismiss the complaint as it is applicable to them will be granted.

III.

[14, 15] Lastly, the *Daye* complaint has named the Pennsylvania Department of Transportation (Penndot) as a party-defendant. Again, jurisdiction is based on diversity of citizenship and, again, the Commonwealth raises the defense of immunity. Whether Penndot, as an agency or alter ego of the State, is immune from the tort liability posited here is a question of state law. Harris v. Pennsylvania Turnpike Comm'n., *supra*, 410 F.2d at 1334-1335. In Conrad v. Commonwealth, Department of Highways, 441 Pa. 530, 272 A.2d 470 (1971), the Supreme Court of Pennsylvania applied the doctrine of governmental immunity to bar an action in trespass for damages against the Department of Highways. In 1970, the Pennsylvania legislature transferred the powers, functions and duties of the Department of Highways to Penndot, 71 P.S. § 511. Thus, the doctrine of governmental immunity, as applied in *Conrad*, would likewise bar this present action. Furthermore, in a highly analogous situation, the Supreme Court held that the Pennsylvania Turnpike Commission, as an instrumentality of the state engaged in a governmental function, is immune from liability in trespass for damages resulting from the negligence of its agents and employees. Rader v. Pennsylvania Turnpike Comm'n., *supra*. Accordingly, the motion of Penndot to dismiss the complaint as it is applicable to them will be granted.

[16] Finally, plaintiffs suggest that the doctrine of governmental immunity is no longer viable and that we should re-examine it. *Conrad* demonstrates its viability as recently as 1971 and in *Harris*, the *Third Circuit* expressly refused to re-examine the doctrine as recently as 1969. We are bound by both.

failure to adequately inspect a public swimming pool, Watson v. Evans, *supra*; and failure of police officers to protect property, Thomas v. Osborn, *supra*.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1769

HUBERT DAYE; TEDESCO BUS COMPANY, INC.; FRANK TEDESCO; and ACADEMY CHARTER SERVICE, INC., each in his or its own right and also on behalf of all passengers of Bus 2065 of the Tedesco Bus Company, Inc., injured on July 15, 1970, at New Smithville, Lehigh County, Pennsylvania, their parents, guardians, next of kin, heirs and legal representatives,

Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA, THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, VICTOR W. ANCKAITIS, LESTER E. JORDAN, CHARLES C. SINCAVAGE, WILLIAM I. DAVIS, ROBERT BROWN and EDWIN REIKER

(D.C. Civil No. 71-1726)

No. 72-1840

MINDY MEYERS, an infant, by her parent and natural guardian, MARVIN MEYERS, and MARVIN MEYERS, individually, and LYNDA BIENENFELD, an infant, by her parent and natural guardian, STANLEY BIENENFELD, and STANLEY BIENENFELD, individually,

Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA

(D.C. Civil No. 71-2167)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 17, 1973

Before: VAN DUSEN, GIBBONS and ROSENN, *Circuit Judges.*

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3

OPINION OF THE COURT

(Filed August 3, 1973)

VAN DUSEN, *Circuit Judge.*

This is an appeal from the opinion and order of the United States District court for the Eastern District of Pennsylvania entered on June 30, 1972 [1] which granted the motions of defendants to dismiss the complaints brought in a tort action for damages arising out of a bus accident allegedly caused by the improper design, construction and maintenance of an interstate highway and its safety devices.

The plaintiffs in No. 72-1769 are the driver and the corporate owner of the bus (hereafter jointly referred to as *Daye*). They demanded damages for injuries suffered in the accident by the driver and the bus company. They also sought to bring a class action under F.R.C.P. 23 on behalf of the injured and deceased passengers.[2] The defendants in *Daye* are the Commonwealth of Pennsylvania, the Department of Transportation in that state and named individuals, who were officials with the Department of Transportation.

The complaint in No. 72-1840 was filed by Marvin Meyers on behalf of his daughter Mindy, and by Stanley Bienenfeld on behalf of his daughter Lynda (hereafter jointly referred to as *Meyers*). In this action the defendants were the Commonwealth of Pennsylvania and the County of Lehigh, Pennsylvania.[3]

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1. The opinion of the District Court is reported in 344 F. Supp. 1337 (E.D. Pa. 1972).

2. The District Court concluded that the action brought by *Daye* was "not maintainable as a class action in that it fails to meet the prerequisites set forth in Rule 23 of the Federal Rules of Civil Procedure." 344 F. Supp. at 1343. The dismissal of the *Daye* complaint insofar as it alleged a class action was not appealed, and has, in any event, been rendered moot by the conclusions of this opinion on the liability issues.

3. The complaint filed by *Meyers* named the County of Lehigh. Based on the stipulation of plaintiffs an order dismissing the action without prejudice against the County was entered May 1, 1972. See Doc. 8.

The tragedy occurred on July 15, 1970 when a chartered tour bus carrying a group of young people, aged 10 to 17, and their counselors was proceeding westbound on U.S. 22 (Interstate 78) about 12 miles west of Allentown, Pennsylvania. A light rain was falling at the time and had been preceded by a heavy shower. The wet pavement allegedly caused the front wheels of the bus to hydroplane, which initiated a skid from which the driver was unable to recover. The bus rotated one hundred and eighty degrees (180°) clockwise through the guardrail alongside the highway and off the northern embankment. It overturned at the bottom of the embankment, ejecting eighteen persons and pinning six of them under the left side of the bus. Seven children were fatally injured.[4]

The study by the National Transportation Safety Board suggested that contributing factors to the accident included:

> "low basic skid resistance of the pavement in wet weather, and the probable presence of water draining across the pavement in an abnormal manner. The fatalities and injuries were caused by an ineffective highway guardrail which failed to prevent the bus from rolling down an embankment, by bus windows which failed to prevent ejection of some passengers, in some cases, by the absence of occupant restraints."[5]

Motions to dismiss were filed by the defendants in both *Daye* and *Meyers*. The Commonwealth in essence argued that it had not waived its immunity under the Eleventh Amendment of the Constitution,[6] that the action was not

4. National Transportation Safety Board, Highway Accident Report, Report No. NTSB-HAR-71-8.

5. Id. at 38.

6. The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

authorized by the laws of the Commonwealth and it was in violation of Article I, Section 11 of the Pennsylvania Constitution.[7] The Department of Transportation entered a similar motion to dismiss. The named defendants in their motion to dismiss contended that the motion was not maintainable as a class action; and that the defendants were public employees and officials of the Commonwealth and were acting within the course and scope of their official duties. The motions to dismiss were granted and this appeal followed.

The parties raise a number of contentions, but the issue central to both their appeals is whether the Commonwealth by its acceptance of funds under the Federal-Aid Highway Act[8] entered into an area of federal preemption resulting in a waiver of its Eleventh Amendment immunity from suit, or whether Congress in enacting the Highway Safety Act[9] intended to create implied causes of action that would permit private parties to pierce the states' sovereign immunity statutes in order to be compensated for injuries sustained as a result of a state's violation of the regulations promulgated under that Act?

Both *Daye* and *Meyers* suggest that since our decision in *Mahler v. United States*, 306 F.2d 713 (3rd Cir. 1962) the Congress has enacted legislation which clearly establishes an intention that states receiving federal highway funds will waive their immunity from suit.[10] They also contend that the recently enacted Highway Safety Act indicates an implied, if not an express, intention by Congress

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7. Article I, Section 11 of the Pennsylvania Constitution, P.S., provides: ". . . Suits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the Legislature may by law direct."

8. 23 U.S.C. § 101 et seq.

9. 23 U.S.C. § 401 et seq.

10. Plaintiffs contend that the Commonwealth by failing to use reasonable care in the design of U.S. Route 22 violated 23 U.S.C. §§ 106(a), 109(a), 109(d), and 109(e). They contend that failure to utilize reasonable care in the construction violated 23 U.S.C. § 114(a). They contend that the failure to provide reasonable care in the maintenance of that highway violated 23 U.S.C. § 116(a) and 116(c).

to regulate the interstate highway systems,[11] and thus subjects the states to Congressional regulation under the power reserved to the federal government by the commerce clause of the Constitution.[12]

In *Mahler* the contention was made by the plaintiff that the United States failed to fulfill its duty by causing to be approved defective highway plans, by failing to discover faulty construction, and by failing to provide for and

11. 23 U.S.C. § 402(a) provides:

"(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary. Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance. In addition such uniform standards shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, and emergency services. Such standards as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations. The Secretary shall be authorized to amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis by one or more States, where the Secretary finds that the public interest would be served by such amendment or waiver."

12. The appellants place great weight on the decision in *Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971) and language in *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971) to support their assertion. However, in *Texas Highway Department* the suit was for injunctive relief designed to enforce the provisions of federal law which set forth conditions under which federal aid may be distributed to the states. Involved in that action was whether the state of Texas needed to comply with Section 102(2) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (Supp. 1971), which requires an environmental impact statement on "major federal actions significantly affecting the quality of the human environment. . . ." The Fifth Circuit held that such a statement would be necessary. Likewise, in *Bartlett*, the issue involved the effect of the National Environmental Policy Act of 1969. The parties in the present action seek monetary damages from the state treasury, precisely what the Eleventh Amendment sought to avoid. We believe that this suit is different from an action to require the proper expenditure of federal funds. See *Ward v. Ackroyd*, 344 F. Supp. 1202 (D. Md. 1972).

make inspections after construction on the interstate highways was completed.[13] This court rejected those arguments holding:

> "that in enacting the provisions respecting approval and inspection by the federal government, it was not the intention of Congress to impose a duty on the Secretary of Commerce, on the Bureau of Public Roads, or on the United States or any of its agencies, to make sure that a member of the travelling public, a user of a federal-aid highway, was not injured because of negligence in carrying out these provisions. The concern of Congress was to make sure that federal funds were effectively employed and not wasted.
>
> . . .
>
> "In light of the legislative history traced above, it is plain that the appellants cannot successfully rely on the federal highway acts unless they are able to show that legislation following the Act of 1921 has affixed to the inspection and approval sections the additional purpose of securing the safety of those using the federal-aid highways.
>
> . . .
>
> "[w]e have discovered nothing which would indicate that Congress has redesigned the inspections during and after construction to function as anything more than that which was originally intended, viz., a means of protecting the federal investment. Without such an expansion of purpose, the inspection provisions of the statute do not create a duty running to these plaintiffs." (footnote omitted)

Mahler, supra at 721, 722; see also *Daniel v. United States*, 426 F.2d 281 (5th Cir. 1970); *Delgadillo v. Elledge*, 337 F. Supp. 827 (E.D. Ark. 1972).

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13. While *Mahler* involved a claim asserted under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and is therefore not completely apposite, its discussion of the federal highway program is instructive.

It is clear that the Eleventh Amendment denies the federal courts jurisdiction to entertain a suit brought by a private party against a state absent that state's consent. E.g., *Employees of the Department of Public Health & Welfare of Missouri, et al. v. Department of Public Health & Welfare of Missouri*, — U.S. —, 41 U.S.L.W. 4493, 4495 (No. 71-1021, Apr. 18, 1973); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). However, a state may, of course, waive its immunity from suit. *Parden v. Terminal R. Co.*, 377 U.S. 184, 186 (1964); *Petty v. Tennessee-Missouri Comm'n.*, 359 U. S. 275 (1959).

In *Parden* a suit was brought against a State-owned railroad to recover damages under the Federal Employers' Liability Fund. The Court held that Alabama by entering into interstate commerce as a rail carrier waived its immunity from suit and "necessarily consented to such suit as was authorized by that Act." 377 U.S. at 192.

In *Petty* the Court recognized that a state may also waive its immunity by forming an interstate agency pursuant to a compact entered into with consent of Congress, which specifically creates a right "to sue and be sued" in that agency. Both *Parden* and *Petty* demonstrate that a waiver most likely will take place when a state "leaves the sphere that is exclusively its own and enters into activities subject to Congressional regulation. . . ." At that point, "it subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. at 196. However, mere entry into such sphere alone will not constitute a waiver. "Congress must express an intent to override the state's immunity." *Red Star Towing and Transportation Co. v. Department of Transportation of N.J.*, 423 F.2d 104, 106 (3rd Cir. 1970); see *Employees of the Department of Public Health & Welfare, supra.*

Although a state at its pleasure may waive its Eleventh Amendment immunity, the conclusion by a court that there has been a waiver will not be lightly inferred. *Petty, supra* at 276. The cases make clear that when a waiver does take

place it must be clear and unequivocal. *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Rothstein v. Wyman*, 467 F.2d 226 (2nd Cir. 1972); *O'Neill v. Commonwealth of Penna.*, 459 F.2d 1 (3rd Cir. 1972); *Knight v. New York*, 443 F.2d 415 (2nd Cir. 1971).

We do not find such a waiver merely because Pennsylvania receives federal highway funds. We have carefully examined the various provisions of the Federal-Aid Highway Act and the Highway Safety Act, the committee reports explaining the sections of those Acts,[14] and debates that took place when the Acts were considered and passed. We are unable to say that Congress conditioned the receipt of those funds upon the states' willingness to waive their immunity from tort liability; nor are we able to say that Congress intended a waiver to implicitly take place by its mere enactment of the Highway Safety Act. Cf. *Rothstein v. Wyman, supra.*

It is noted that the Senate Report to the Federal-Aid Highway Act of 1966, while tracing the historical role of government in the construction and maintenance of public highways recognized that

> "[I]n accordance with the concepts of division of authority between the Federal Government and the States, the legislation reserved to the States the initiative in determining what roads were to be built, the character of their improvement in the preparation of plans and specifications, the acquisition of rights-of-way and the awarding of contracts—subject to Federal approval. It placed immediate supervision of construction in the hands of the State highway departments, but provided for Federal review and approval. Thus,

14. For the legislative history of 23 U.S.C. § 402 see 1966 U.S. Code Cong. and Adm. News at 2741; 1968 U.S. Code Cong. and Adm. News at 3482; 1970 U.S. Code Cong. and Adm. News at 5392. Discussion of 23 U.S.C. § 106 may be found in 1963 U.S. Code Cong. and Adm. News at 1027; and 1970 U.S. Code Cong. and Adm. News at 5392; for the history of 23 U.S.C. § 109 see 1966 Code Cong. and Adm. News at 2800; and 1970 U.S. Code Cong. and Adm. News at 5392. 23 U.S.C. § 114 is discussed in the 1960 U.S. Code Cong. and Adm. News at 3159.

> each level of government had its own responsibilities and authority, and a balanced partnership between the States and the Federal Government was initiated."

1966 U.S. Code Cong. and Adm. News, at 2801. There is no indication that this division of authority has been altered. Therefore, the District Court properly concluded:

> "We, therefore, hold: (1) in voluntarily applying for and accepting federal funds under the Federal-Aid Highway Act and in entering into interstate commerce in the construction of interstate highways, the Commonwealth has not waived its Eleventh Amendment immunity; and (2) neither the Federal-Aid Highway Act nor the Highway Safety Act create an implied cause of action to recover damages for personal injuries sustained as a result of a violation of the standards set forth therein or regulations promulgated thereunder."

344 F. Supp. at 1349. This Court may not graft on to Congressional actions an intent which is neither expressly, nor implicitly provided.

Daye, in addition, contends that if there has not been a waiver of immunity, the immunity of Pennsylvania and the Department of Transportation must fall before the guarantees of the Fourteenth Amendment. We have held otherwise. See *O'Neill v. Commonwealth, supra* at 2.

Daye also alleges that the District Court erred in dismissing the suit against the named individual officers of the Pennsylvania Department of Transportation. However, the recent decision in *Dubree v. Commonwealth of Penna., et al.*, — Pa. Commonwealth Ct. —, — A.2d — (No. 433 C.D. April 9, 1973) reaffirmed the doctrine that in Pennsylvania state highway officials may escape liability where they acted within the scope of their authority and their alleged negligent conduct was not intentionally malicious,

wanton, or reckless.[15] Since *Daye's* complaint did not allege intentional or malicious negligence, the District Court properly dismissed the action against the named defendants. See 344 F. Supp. at 1349-50.

We have considered *Meyers'* contention that interference with the right to engage in interstate commerce is a constitutional tort for which the courts will imply a remedy and reject it.

In conclusion we note that while the doctrine of immunity is under attack in Pennsylvania and has been withdrawn from governmental units, municipal corporations and quasi-corporations, *Ayala, Jr., et al. v. Philadelphia Board of Public Education*, — Pa. —, — A.2d — at n.2 (May 23, 1973), it nevertheless remains the law in Pennsylvania that state governmental functions are protected. *Biello v. Pennsylvania Liquor Control Board*, — Pa. —, — A.2d — (No. 728 March 16, 1973). Whether or not the doctrine of sovereign immunity is an "anachronism" that provides "unjust" results, *Biello, supra* (Nix dissenting), is for the courts of the Commonwealth to resolve. We are required to follow the state law insofar as diversity is a jurisdictional basis in these suits and are unable to alter that which the state courts and legislature have refused to change.

The order of the District Court dismissing the complaints in No. 72-1769 and No. 72-1840 will be affirmed.

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15. Slip Opinion at 7; see also *Ammlung v. City of Chester, et al.*, — Pa. Super. Ct. —, — A.2d — (No. 1684 March 27, 1973).

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TITLE 23, U.S.C.

Highway Act, § 101, et seq.

§ 101. Definitions and declaration of policy

(a) As used in this title, unless the context requires otherwise—

* * * * *

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the Coast and Geodetic Survey in the Department of Commerce), acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, and acquisition, and rehabilitation, relocation, and construction of replacement housing.

* * * * *

The term "forest road or trail" means a road or trail wholly or partly within or adjacent to and serving the national forests and other areas administered by the Forest Service.

The term "forest development roads and trails" means those forest roads or trails of primary importance for the protection, administration, and utilization of the national forest and other areas administered by the Forest Service or, where necessary, for the use and development of the resources upon which communities within or adjacent to the national forest and other areas administered by the Forest Service are dependent.

The term "forest highway" means a forest road which is of primary importance to the States, counties, or com-

munities within, adjoining, or adjacent to the national forests, and which is a Federal-aid system.

* * * * *

The term "Indian reservation roads and bridges" means roads and bridges that are located within or provide access to an Indian reservation or Indian trust land or restricted Indian land which is not subject to fee title alienation without the approval of the Federal Government on which Indians reside whom the Secretary of the Interior has determined to be eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

* * * * *

The term "Secretary" means Secretary of Commerce.

The term "urbanized area" means an area so designated by the Bureau of the Census.

* * * * *

The term "Federal-aid secondary system" means the Federal-aid highway system described in subsection (c) of section 103 of this title.

The term "Federal-aid urban system" means the Federal-aid highway system described in subsection (d) of section 103 of this title.

The term "Interstate System" means the National System of Interstate and Defense Highways described in subsection (e) of section 103 of this title.

* * * * *

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of

local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the twenty years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending June 30, 1976, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

(c) It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation, for purposes and projects as provided in this title, by any officer or employee in the executive branch of the Federal Government, except such specific sums as may be determined by the Secretary of the Treasury, after consultation with the Secretary of Transportation, are necessary to be withheld from obligation for specific periods of time to assure that sufficient amounts will be available in the Highway Trust Fund to

defray the expenditures which will be required to be made from such fund.

(d) No funds authorized to be appropriated from the Highway Trust Fund shall be expended by or on behalf of any Federal department, agency, or instrumentality other than the Federal Highway Administration unless funds for such expenditure are identified and included as a line item in an appropriation Act and are to meet obligations of the United States heretofore or hereafter incurred under this title attributable to the construction of Federal-aid highways or highway planning, research, or development, or as otherwise specifically authorized to be appropriated from the Highway Trust Fund by Federal-aid highway legislation.

§ 116(a). *Maintenance*

(a) It shall be the duty of the State highway department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system.

§ 125(b). *Emergency relief*

(b) The Secretary may expend funds from the emergency fund herein authorized for the repair or reconstruction of highways on the Federal-aid highway systems, including the Interstate System, in accordance with the provisions of this chapter. Except as to highways, roads, and trails mentioned in subsection (c) of this section, no funds shall be so expended unless the Secretary has received an application therefor from the State highway department, and unless an emergency has been declared by the Governor of the State and concurred in by the Secretary.

§ 135. *Urban area traffic operations improvement programs*

(a) The Congress hereby finds and declares it to be in the national interest that each State should have a continuing program within the designated boundaries of urban areas of the State designed to reduce traffic congestion and to facilitate the flow of traffic in the urban areas.

(b) The Secretary may approve under this section any project on an extension of the Federal-aid primary or secondary system in urban areas and on the Federal-aid urban system for improvements which directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and loading and unloading ramps. If such project is located in an urban area of more than fifty thousand population, such project shall be based on a continuing comprehensive transportation planning process carried on in accordance with section 134 of this title.

(c) The sums authorized to carry out this section shall be apportioned in accordance with section 104(b)(3) of this title.

(d) The Secretary shall report annually on projects approved under this section with any recommendations he may have for further improvement of traffic operations in accordance with this section.

Highway Safety Act, § 401 et seq.

§ 401. *Authority of the Secretary*

The Secretary is authorized and directed to assist and cooperate with other Federal departments and agencies, State and local governments, private industry, and other interested parties, to increase highway safety.

§ 402(a). *Highway safety programs*

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary. Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance. In addition such uniform standards shall include, but not be limited, to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, and emergency services. Such standards as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations. The Secretary shall

be authorized to amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis by one or more States, where the Secretary finds that the public interest would be served by such amendment or waiver.

§ 403. *Highway safety research and development*

The Secretary is authorized to use funds appropriated to carry out this section to carry out safety research which he is authorized to conduct by subsection (a) of section 307 of this title. In addition, the Secretary may use the funds appropriated to carry out this section, either independently or in cooperation with other Federal departments or agencies, for (1) grants to State or local agencies, institutions, and individuals for training or education of highway safety personnel, (2) research fellowships in highway safety, (3) development of improved accident investigation procedures, (4) emergency service plans, (5) demonstration projects, and (6) related activities which are deemed by the Secretary to be necessary to carry out the purposes of this section. Added Pub. L. 89-564, Title I.

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In the Supreme Court of the United States

October Term, 1973
No. 73-721

MINDY MEYERS, an Infant, by Her Parent and Natural Guardian, MARVIN MEYERS, and MARVIN MEYERS, Individually, and LYNDA BIENENFELD, an Infant, by Her Parent and Natural Guardian, STANLEY BIENENFELD, and STANLEY BIENENFELD, Individually,

Petitioners

v.

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent

HUBERT DAYE; TEDESCO BUS COMPANY, INC.; FRANK TEDESCO; and ACADEMY CHARTER SERVICE, INC., Each in His or Its Own Right and Also on Behalf of All Passengers of Bus 2065 of the Tedesco Bus Company, Inc., Injured on July 15, 1970, at New Smithville, Lehigh County, Pennsylvania, Their Parents, Guardians, Next of Kin, Heirs and Legal Representatives,

Petitioners

v.

THE COMMONWEALTH OF PENNSYLVANIA, THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, VICTOR W. ANCKAITIS, LESTER E. JORDAN, CHARLES C. SINCAVAGE, WILLIAM I. DAVIS, ROBERT BROWN and EDWIN REIKER,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINION BELOW

The opinion delivered in the Court below is reported in 483 F. 2d 294 (sub nomine *Daye v. Commonwealth of Pennsylvania*). The opinion was delivered on August 3, 1973, and is appended to the Petition for a Writ of Certiorari.

JURISDICTION

The Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Is not the Commonwealth of Pennsylvania immune from suit in an action instituted against it in the United States Courts by citizens of a foreign State, as guaranteed by the Eleventh Amendment to the Constitution of the United States?

2. Did Congress intend to create a private right of action by the Highway Safety Act of 1966 (23 U.S.C. 401 et seq.) against States accepting federal assistance in the design, construction and maintenance of public highways?

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provided:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State. . ."

COUNTER-STATEMENT OF THE CASE

On July 15, 1970, a bus proceeding on U.S. 22, Interstate 78, in Lehigh County, Pennsylvania, and in which petitioners were passengers, skidded off the road and overturned. As a result of that occurrence two actions were instituted wherein the Commonwealth of Pennsylvania was named as a defendant. One of the actions was instituted by Hubert Daye, the operator of the bus, and the owner of the bus, and the other by two minors who were passengers. Both complaints allege that the accident was caused by the negligence of the Commonwealth in the design, construction and maintenance of the highway in question.

The Report of the National Transportation Safety Board referred to in Petitioner's petition was not made a part of either Complaint as filed, nor referred to therein.

ARGUMENT

NO WAIVER OF THE 11TH AMENDMENT BY THE COMMONWEALTH, EXPRESS OR IMPLIED, CAN BE FOUND IN THE ACCEPTANCE OF FEDERAL FUNDS UNDER ANY FEDERAL AID HIGHWAY ACT

The Eleventh Amendment to the Constitution of the United States states:

> "The judicial power of the United States shall not be construed, or extend, to any suit in law or in equity commenced or prosecuted against one of the United States by citizens of a foreign state."

The protection provided by this Amendment has been construed to be waivable by the State under certain limited conditions. Thus, a State agency may be enjoined from violating a federal law, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F. 2d 1013 (5th Cir., 1971). Also, a state may waive its immunity by entering into an activity involving interstate commerce where Congress has conditioned such entry upon the allowance of a private right of action under limited circumstances, *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964). A State may also waive its immunity by forming an interstate

agency pursuant to a congressionally sanctioned compact specifically creating a right "to sue and be sued" in that agency, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959). Finally, a state may, arguably, waive its immunity by engaging in an activity of interstate commerce of a type allowable only by sufferance of Congress where a private right of action is permitted generally, *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 (4th Cir. 1968).

In the present case, petitioners argue that by accepting federal funds for the design and construction of the highway upon which the accident herein involved occurred, the Commonwealth waived its constitutional immunity and subjected itself to a private cause of action. The private cause of action is seen by petitioners as arising out of the Highway Safety Act of 1966, 23 U.S.C. 401 et seq., wherein Congress provided that states should design, construct and maintain federally-funded highways in a safe and secure manner.

In order for this Honorable Court to concur in this position, it would be necessary to ignore the entire highway-aid scheme established by Congress as early as 1916, Federal Aid Highway Act of 1916, June 11, P. L. 156, 39 Stat. 355, and followed ever since. There Congress specifically avoided any federal involvement in the State highway program beyond its funding. As to construction, the Act said:

> "The construction work and labor in each State shall be done in accordance with its laws,

and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant to this Act."

As to maintenace, the Act provided:

"To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance."

The most recent provision, found at 23 U.S.C. 116(c), enacted August 27, 1959, as P. L. 85-767, provides:

"If at any time the Secretary shall find that any project constructed under the provisions of this chapter, or constructed under the provisions of prior Acts, is not being properly maintained, he shall call such fact to the attention of the State highway department. If, within ninety

> days after receipt of such notice, such project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the entire State until such project shall have been put in proper condition of maintenance, unless such project is subject to an agreement pursuant to subsection (b) of this section, in which case approval shall be withheld only for secondary or urban projects in the county or municipality where such project is located."

Section 116 further provides in subsection (a):

> "It shall be the duty of the State highway department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system."

Clearly, maintenance is considered a state function, to be conducted by state officials, according to state law. The Congress merely provides for the establishment of minimum standards. Throughout, the Congress envisions its role as that of an investor. The sanction provided in every case for failure to comply with some congressional edict is the withdrawal of federal funds. The Congress requires nothing of the states, either at the construction and design stage or at the maintenance stage. The State has the option at any time to ignore the Federal Aid Highway Act and its progeny, the only result being the cessation

of Federal Aid. This is further seen by the fact that even the safety programs established under 23 U.S.C. 401 et seq., are *not* federal programs, but State programs:

> "Each state shall have a highway safety program approved by the Secretary . . ." 23 U.S.C. 402(a)

If a State fails to institute an adequate safety program, the Congress provides that the federal investment in the State's highway program should be reduced, 23 U.S.C. 402(c).

The key word to the scheme established by Title 23 is "participation". The federal government participates in the highway program; it does not sanction it, control it, or truly regulate it. Federal regulations, such as they are not *mandatory,* but rather the basis for federal participation. This distinction is of great importance in this case, since the federal highway aid scheme makes it clear that a state is not venturing into the "federal realm" by accepting federal funds. There are no "interstices" to fill, since the statutory scheme is complete. Crudely stated, the Congress has said to the states: we will participate in your highway program if you build highways according to federal guidelines we establish. If you do not, or if you cease doing so, we will withhold all or part of our investment.

This interpretation is consistent with *all* interpretations which have any bearing on this case. In *Mahler v. United States,* 306 F. 2d 713 (3rd Cir., 1962), cert. denied 371 U.S. 923, 9 L. Ed. 2d 231, 83 S. Ct.

390. Plaintiffs based their cause of action on the Federal Tort Claims Act (28 U.S.C. 1346) and upon federal defendant's alleged failure to properly inspect and supervise the construction and maintenance of a State highway built with the aid of federal funds. The accident was caused by a boulder lying in the road. Although the Court in *Mahler* did not specifically comment on the question of waiver of immunity under the 11th Amendment since only the federal government was involved, the Court did consider the scheme of the Federal Highway Program, saying:

> "Our inquiry therefore must be directed toward ascertaining the intent of Congress in enacting the pertinent legislation.
>
> Our conclusions are aided greatly by the relevant legislative history. We state preliminarily that when legislating in respect to roads Congress acts under the authority conferred upon it by Article I, Section 8, of the Constitution to regulate interstate commerce, to establish post roads, and to provide by expenditure of tax revenues for the National Defense and the General Welfare. But it is clear nonetheless that the construction, maintenance and the regulation of highways have remained state functions. South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 187, 58 S. Ct. 510, 514, 82 L. Ed. 734 (1938). In the cited case Mr. Justice Stone said: 'From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly

within its competence, even though interstate commerce is materially affected. Minnesota Rate Cases [Simpson v. Shepard], 230 U.S. 352, 416 [33 S. Ct. 729, 57 L. Ed. 1511]. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. Id. With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.' 303 U.S. at 187-188, 58 S. Ct. at 515. In note 5 cited to the text, Mr. Justice Stone cites a large number of cases in which the Supreme Court has upheld state regulations materially affecting interstate commerce. In Maurer v. Boardman, 336 Pa. 17, 7 A. 2d 466 (1939), aff'd sub nom. Maurer v. Hamilton, 309 U.S. 598, 60 S. Ct. 726, 84 L. Ed. 969 (1940), it was held that the highways in Pennsylvania are owned by the Commonwealth and that their preservation and the maintenance of safety on them are a concern of the state. It seems clear from the Acts of Congress and their accompanying legislative history, that grants-in-aid under the Federal Highway Program were and are designed to encourage states to construct their own highways and that the primary function of the Bureau of Public Roads, in approv-

ing plans submitted to it by a state and inspecting roads during and after construction, is that of making sure that federal appropriations are being utilized properly and efficiently by the respective states and are not being wasted.

Funds appropriated by Congress for the highway program are apportioned to the states according to a statutory formula, 23 U.S.C. §§21, 21a, 21a-2. The states then create general programs to employ these funds and prepare estimates for each project. 23 U.S.C. §12. Construction contracts are awarded by the states. The states pay the contractor and the respective states become and remain responsible for supervision of construction and for the maintenance of the highways after completion. 23 U.S.C. §§13, 15. The states are at all times the owners of the roads and are primarily responsible for their operation.

* * * * * *

The statutory scheme shows a weighing of the functions to be performed by the states and the Bureau of Public Roads, acting for the United States. The states are given what has been aptly described as 'operational control' of the projects. Congress gave the Bureau veto power insofar as the use of federal funds were concerned.

* * * * * *

The pertinent provisions of the Federal-Aid Road Act of 1916 were incorporated into the Federal Highway Act of 1921, 42 Stat. 212. The concern of the Congress in 1916 that fed-

eral funds be not dissipated but used effectively by the states is reiterated in a House report on S. 1072, the bill which became the Act of 1921, as follows: 'The purpose in presenting this bill to Congress is to provide amendments to the present law and to outline a definite plan for road construction, as well as to make such requirements as will conserve the public funds * * *.' H. Rep. No. 162, 67th Cong., 1st Sess., p. 4. The basic structure thus created by these statutes has been the foundation for all subsequent federal highway legislation. See S. Rep. No. 1965, 84th Cong., 2d Sess., p. 4 (1956); Report of the President's Advisory Committee on a National Highway Program, H. Doc. No. 93, 84th Cong., 1st Sess., p. 4 (1955); Levin, Federal Aspects of the Interstate Highway Program, 38 Neb. L. Rev. 377, 378 (1959); Note, 108 U. Pa. L. Rev. 534, 538-539 (1960). In light of the legislative history traced above, it is plain that the appellants cannot successfully rely on the federal highway acts unless they are able to show that legislation following the Act of 1921 has affixed to the inspection and approval sections the additional purpose of securing the safety of those using the federal-aid highways.

Although Congress early exhibited an awareness of the problem of highway safety and this awareness has continued to manifest itself in legislation dealing with the federal highway program, we have discovered nothing which would indicate that Congress has redesigned the inspections during and after construction to func-

> tion as anything more than that which was originally intended, viz., a means of protecting the federal investment. Without such an expansion of purpose, the inspection provisions of the statute do not create a duty running to these plaintiffs." 306 F. 2d at 716-717, 721-722.

See also, *D. R. Smalley & Sons, Inc. v. United States,* 372 F. 2d 505 , 507 (Ct. Cl., 1967), where the court followed *Mahler* and refused to grant relief to a contractor who sought to impose liability on the federal government because of harm caused by the federal regulations on which grants to the State of Ohio was based.

Petitioners argue that the 1966 Act, which added Chapter IV to Title 23 U.S.C., supersedes the *Mahler* decision. As has been shown, however, Chapter IV does nothing to change the basic framework of the scheme established by Congress in 1916. The only federal sanction is the withdrawal of funding. The finding of a waiver by this court, in addition to the foregoing difficulties would have ludicrous or unwarranted consequences. Narrowly read, a plaintiff's right of action would depend not on the condition of the highway, but on the nature of the funding entity and whether on any given day the highway was within or without the federal aid system. If this waiver were not so limited, any case involving highway design or maintenance of any kind on any highway would be subject to federal scrutiny. In Pennsylvania, furthermore, the State Courts would be precluded from hearing these cases. Such a curious dichotomy was clearly not contemplated, and definitely not desired by Congress.

It is not too much to say that this Court is not being asked to find a *waiver,* but is being asked to circumvent the Eleventh Amendment entirely insofar as highway matters are concerned. This is clearly not consonant with the Congressional Act, for it would mean that this Court must find that Congress pre-empted the State's right to design, maintain and construct highways—clearly at odds with Title 23.

The extreme caution expressed in the opinions cited at the beginning of this section demonstrate the hesitancy of this Court to substantially limit the effect of the Eleventh Amendment. In *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, supra, Mr. Justice Douglas confronted this question at the outset of his majority opinion, stating:

> "When the Court in 1793 held that a State could be sued in the federal courts by a citizen of another State (Chisholm v Georgia (US) 2 Dall 419, 1 L ed 440), the Eleventh Amendment was passed precluding it. But this is an immunity which a State may waive at its pleasure (Missouri v Fiske, 290 US 18, 24, 78 L ed 145, 148, 54 S Ct 18) as by a general appearance in litigation in a federal court (Clark v. Barnard, 108 US 436, 447, 448, 27 L ed 780, 784, 785, 2 S Ct 878) or by statute. Ford Motor Co. v Department of Treasury, 323 US 459, 468-470, 89 L ed 389, 396, 397, 65 S Ct 347. The conclusion that there has been a waiver of immunity will not be lightly inferred. Murray v Wilson Distilling Co., 213 US 151, 171, 53 L ed 742, 751, 29 S Ct 458. Nor will a waiver of immu-

> nity from suit in state courts do service for a waiver of immunity where the litigation is brought in the federal court. Chandler v. Dix, 194 US 590, 591, 592, 48 L ed 1129, 1130, 1131, 24 S Ct 766. And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal, courts. Cf. Delaware River Joint Toll Bridge Com. v. Colburn, 310 US 419, 84 L ed 1287, 60 S Ct 1039. Suits against agencies of a State based on maritime tolls are no exception to these rules. Re New York, 256 US 490, 65 L ed 1057, 41 S Ct 588."

The opinion went on to emphasize that the reason Petty was allowed to maintain an action was because the compact between Missouri and Tennessee as approved by Congress pursuant to the Compact Clause, Art. I, Section 10, cl. 3. This compact specifically stated:

> "That nothing herein contained shall be construed *to affect, impair, or diminish any right, power, or jurisdiction* of the United States or *of any court*, department, board, bureau, officer, or official *of the United States, over or in regard to any navigable waters, or any commerce between the States* or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agree-

> ment or otherwise affected by the terms thereof." (Italics added by the Supreme Court.) 359 U.S. at 277-278.

Your Honorable Court went on to note that this compact has been accepted by both Tennessee and Missouri. However, since the compact was approved by the Congress specifically, its interpretation was held to be a federal question (359 U.S. at 278), and that:

> "[The Congress] approved a sue-and-be-sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have." 359 U.S. at 280

Rather than indicate a tendency toward limiting the scope of the Eleventh Amendment, *Petty*, supra, reflects a concern on the part of Your Honorable Court to avoid great expansions of federal jurisdiction in this field.

The caution found in the foregoing case was again exhibited in *Parden et al. vs. Terminal Railway of the Alabama State Docks Dept. et al.*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207, rehearing denied 377 U.S. 1010, 12 L. Ed. 1057, 84 S. Ct. 1903 (1964). The *Parden* case centers around a railroad operated for commercial purposes by the Alabama State Docks Department. The Congress had passed the Federal Employers' Liability Act, which established that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier com-

mence," and that "under this chapter an action may be brought in a district court of the United States. . ." 45 U.S.C. Section 51, Section 56. This action did not specifically raise the 11th Amendment, since the Plaintiffs were Alabama residents, but the same doctrine applied through *Hans v. Louisiana,* 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890). In *Parden,* both the District Court and the Court of Appeals found that Alabama was immune. Your Honorable Court reversed, saying:

> "Where a States' consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. Here as in Petty, the States by venturing into the congressional realm 'assume the conditions that Congress under the Constitution attached.' 359 U.S. at 281-282
>
> Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation it, subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. at 196.

In reaching this conclusion, however, Your Honorable Court stated that:

> "To read a 'sovereign immunity exception' into the Act would result, moreover, in a right without a remedy; it would mean that Congress made 'every' interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state-owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result.
>
> We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately-owned common carriers by railroad in interstate commerce." 377 U.S. 190

In other words, Your Honorable Court placed great emphasis on the fact that in *Parden*, Congress had created a specific and clear mechanism for the recovery of damages. No such specific mechanism exists under the Highway Aid Act, where, in fact, quite a different, but equally specific mechanism is provided the withholding of federal funds. The Court also was impressed by the commercial nature of Alabama activities. It cannot be argued that highways under the jurisdiction of the Pennsylvania Department of Transportation have any commercial purpose.

The degree of caution expressed in the foregoing decisions is also reflected in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 (4th Cir., 1968). *Lauritzen* concerned an accident caused

by an allegedly submerged base of a collapsed light tower. The libellant's ship collided with the base. The light tower was owned and operated by the District. After finding the District to be an agency of the state government, the Fourth Circuit went on to consider the status of the District's immunity under the Eleventh Amendment stating:

> "Necessarily, the State recognized that she built in the Bay only by sufferance of the Federal government. This acknowledgment is conclusively evidenced by her petition for permission pursuant to the act of Congress, 33 U.S.C.M. §401 et seq., to occupy navigable waters with bridges and tunnels. The supplication of the State, and her reception into the Federal domain, meant surrender, pro tanto and pro tempore, of State sovereignty and submission to the paramount overlordship of the United States during the tenancy.
>
> Congressional regulation allows causes involving activities in and upon the navigable waterways of the Nation to be adjudicated in the admiralty. 28 U.S.C. §1333. Accordingly, we think liability of the Tunnel District to the Danish suitor upon the maritime tort was justiciable in the chosen instant court." 404 F. 2d at 1003-1004

It should be noted that this finding is arguably consistent with the *Petty* and *Parden* cases, supra. The court found a realm where the Congress had and exercised exclusive control in addition to a specific statute allowing a private right of action.

In *Red Star Towing & Transportation Co. vs. Department of Transportation of New Jersey*, 423 F. 2d 104 (1970), Plaintiffs alleged that a barge operated by them was caused to collide with the fender system of a state-owned bridge due to the state's negligent maintenance of the system and negligent delay in opening the bridge. Plaintiff argued that New Jersey had waived its immunity by building in navigable waters. The Court distinguished the *Parden* case, supra, and commented on *Lauritzen*, supra, stating:

> "In the Parden case the Supreme Court made clear that the mere entry of a State into a field of congressional regulation will not subject it to suit by private individuals. 377 U.S. at 186, 84 S. Ct. 1207. Congress must express an intent to override the State's immunity. In Parden the Supreme Court found such an intent in the creation by Congress of such a cause of action against private persons as was asserted against the State. However, as has been pointed out, the presently relevant statute regulating the bridging of navigable streams does not confer any new civil remedy upon private parties and thus cannot by logical inference be read as intended to impose equivalent civil liability on an otherwise immune State. A contrary result in Chesapeake Bay Bridge and Tunnel District v. Lauritzen, E.D. Va. 1966, 259 F. Supp. 633, aff'd, 4th Cir. 1968, 404 F. 2d 1001, seems to be based upon the court's conclusion that the Rivers and Harbors Appropriation Act of 1899 was designed to protect private persons. But that, in our view, is not enough. Where Congress,

> in providing protection against private violators created no new remedy other than penal sanctions, we think it is illogical to imply that Congress intended that a violation by the State should give rise to a civil claim for damages. Moreover, since the State must consent to suit it seems arbitrary to say that the State consents to civil liability that could not be anticipated by reading the relevant federal statute." 423 F. 2d at 106.

It is the position of the Commonwealth that in *Red Star* Plaintiffs had a stronger case than Petitioners do here. Navigable waters are, historically, very much in the Federal domain. Roads, on the other hand, are more closely allied to the states domain. The Federal Highway Act repeatedly emphasizes the nature of Federal involvement. No hint of possible tort liability exists in any provision of Title 23 U.S.C., especially not in Chapter IV of that title. "The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them," *Frankel v. Heym,* 466 F. 2d 1226, 1229 (1972).

In *Ford Motor Company v. Department of the Treasury of the State of Indiana,* 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), individual members of the Treasury Board as well as the Department were sued under a statute authorizing the maintenance of such suits. The state argued that the statute involved only authorized state courts to hear such cases. This point was raised for the first time in the

United States Supreme Court on appeal by the state. In ordering the dismissal of the action for want of jurisdiction the Court said:

> "While the state's immunity from suit may be waived, Clark v. Barnard, 108 US 436, 447, 27 L ed 780, 784, 2 S Ct 878; Gunter v. Atlantic Coast Line R. Co. 200 US 273, 50 L ed 477, 26 S Ct 252; Missouri v. Fiske, 290 US 18, 24, 78 L ed 145, 148, 54 S Ct 18, there is nothing to indicate authorization of such waiver by Indiana in the present proceeding.
>
> Section 64-2614(a) authorizes 'action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected.' In the Read Case we construed a similar provision of an Oklahoma tax refund statute as a waiver of state immunity from suit in state courts only. 322 US 47, 54, 88 L ed 1121, 1126, 64 S Ct 873. As was said in that case: 'When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts . . . when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be

found.' Cf. United States v. Shaw, 309 US 495, 501, 84 L ed 888, 892, 60 S Ct 659. Section 64-2614 does not contain any clear indication that the state intended to consent to suit in federal courts. The provision in this section which vests original jurisdiction of suits for refund in the 'circuit or superior court of the county in which the taxpayer resides or is located' indicates that the state legislature contemplated suit in the state courts. Moreover, this interpretation of §64-2614(a) to authorize suits only in state courts accords with the state legislative policy. Indiana has adopted a liberal policy toward general contract claimants but confines their suits against the state to state courts." 323 U.S. at 465-6166

Also, see *Murray et al. v. Distilling Company et al.*, 213 U.S. 151, 53 L. Ed. 742, 29 S. Ct. 458 (1909), where the court again emphasized the need for a highly specific waiver (213 U.S. at 170-171). Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights, and may not presume acquiescence in the loss of fundamental rights, *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 A.L.R. 347 (1938); *Fay v. Noia*, 372 U.S. 391, 9 L. Ed. 2d 847, 83 S. Ct. 822 (1963).

In *Employees of the Department of Public Health and Welfare of Missouri et al. v. Department of Public Health and Welfare of Missouri*, —— U.S. ——, 93 S. Ct. 1614, 36 L. Ed. 2nd 251 (1973), the action was by employees of the State health facilities for

overtime pay due them under the Fair Labor Standards Act. Section 16(b) of the Act made employers liable for the amount of unpaid minimum wages in an action "in any court of competent jurisdiction". The District Court dismissed the action as being bound by the provisions of the Eleventh Amendment and the Circuit Court of Appeals affirmed. On certiorari Your Honorable Court affirmed, saying:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State. Parden involved the railroad business which Alabama operated 'for profit.' 377 US, at 185, 12 L Ed 2d 233. Parden was in the area where private persons and corporations normally ran the enterprise.
>
> "State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit, are not proprietary . . ."
>
> . . .
>
> "[7] But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. The Parden opinion did state that it would be 'surprising' to learn that Congress made state railroads liable to employees under FELA yet provided 'no means by which that liability may be enforced.' 377 US, at 197, 12 L Ed 2d 233. It would also be sur-

prising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old §16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum." 36 L. Ed. 2nd 256, 257.

The line of cases starting with *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F. 2d 1013 (5th Cir., 1971), often categorized as environmental cases has no application here. As this court noted in *Pennsylvania Environmental Council v. Bartlett*, 454 F. 2d 613 (3rd Cir., 1971), the applicability of Eleventh Amendment immunity to such cases is at least very doubtful. However, plaintiffs in neither of the foregoing cases sought financial damages, but rather sought equitable relief. Typically, Plaintiffs allege the violation of a federal law or regulation and seek to enjoin the state or federal government from further action until that law is complied with. The key question in every case is whether or not the conditions upon which the federal grant is based have been complied with. The Plaintiffs do not seek to punish an allegedly violating agency or official, but

seek a court order which defines the conditions for further federal financing under federal law. This is obviously a federal question, as it revolves strictly around the expenditure of federal funds. Furthermore, the National Environmental Policy Act of 1969, 42 U.S.C. Sect. 4321, upon which many of the environmental suits are passed, provides only procedural remedies, as opposed to substantive rights. Thus, a group of businessmen were not entitled to an injunction on the basis of threatened loss of profits, *Pizitz vs. Volpe*, 4 E.R.C. 1197 (M.D. Ala., 1972). Clearly, related provisions in Title 23, such public hearing under Sect. 123, also provide only procedural remedies—and courts may direct relief toward this goal.

A State's rights under the Eleventh Amendment are just as fundamental, in constitutional terms, as the citizen's right to jury trial, to protection from illegal search and seizure, and to freedom of speech. The question which this Court is being asked to decide is far more fundamental than whether several individuals involved in extremely unfortunate accidents may recover for their alleged losses. The law is clear that if such a right of recovery does not exist, it must be legislatively created. The question before this court, however, goes to the nature of our federal system of government. The State is clearly immune from suit under the Eleventh Amendment. Furthermore, there is no language, expressed or implied, which would suggest the creation of a federal right of action as a condition precedent to receiving a federal highway grant. To hold that a cause of action exists because of an expression of Congres-

sional interest, or because of the creation of a federal assistance program, would end the significance of the Eleventh Amendment to the United States Constitution.

The District Court, in its well-reasoned opinion, recognized the very clear constitutional limits imposed on the federal judiciary system in this case, and the Commonwealth respectfully asks that that decision be affirmed.

CONCLUSION

The Respondent, Commonwealth of Pennsylvania, acting through its Department of Transportation, respectfully requests Your Honorable Court to deny the Petition for Writ of Certiorari to the Circuit Court of Appeals (3rd Circuit).

Respectfully submitted,
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